88-769

No. _____

Supreme Court, U.S.
FILED
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CLERK

In The
Supreme Court of the United States
October Term, 1988

JANE HARLAN,

Petitioner,

vs.

THE COMMITTEE ON PROFESSIONAL ETHICS AND CONDUCT OF THE IOWA STATE BAR ASSOCIATION, and its individual members thereof, Michael H. Figenshaw, John J. Greer, James L. Tyler, Karen E. Shaff, Marie Prince-Cohen, D. Carlton Shull, William C. Davison, Norman G. Bastemeyer, Mary Louise Petersen, and Carolyn Sloan, in their individual and official capacities; LARRY JACKSON, Deputy Commissioner of the Iowa Department of Human Services, and GORDON E. ALLEN, Special Assistant Iowa Attorney General, in their individual and official capacities,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

1. Did the complaint of the petitioner set forth a cause of action under 42 U.S.C. § 1983?

2. Was the opinion of the Eighth Circuit affirming the dismissal of the action by the District Court erroneous?

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No. _____

In The

Supreme Court of the United States

October Term, 1988

JANE HARLAN,

Petitioner,

vs.

THE COMMITTEE ON PROFESSIONAL ETHICS AND CONDUCT OF THE IOWA STATE BAR ASSOCIATION, and its individual members thereof, Michael H. Figenshaw, John J. Greer, James L. Tyler, Karen E. Shaff, Marie Prince-Cohen, D. Carlton Shull, William C. Davison, Norman G. Bastemeyer, Mary Louise Petersen, and Carolyn Sloan, in their individual and official capacities; LARRY JACKSON, Deputy Commissioner of the Iowa Department of Human Services, and GORDON E. ALLEN, Special Assistant Iowa Attorney General, in their individual and official capacities,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

Petitioner prays that a writ of certiorari issue to review the Decision of the United States Court of Appeals for the Eighth Circuit filed August 12, 1988.

OPINION BELOW

The opinion of the United States Court of Appeals for the Eighth Circuit affirmed the decision of the United States District Court for the Southern District of Iowa, the Honorable Lyle E. Strom presiding, dismissing the complaint of the petitioner. The opinon of the Eighth Circuit is set forth in the Appendix, pp. 1-4 and the decision of the District Court is set forth in the Appendix, pp. 7-12.

———o———

JURISDICTION

Jurisdiction of this Court is invoked under 28 U.S.C. § 1254.

———o———

STATEMENT OF THE CASE

The petitioner, Jane Harlan, is an attorney duly licensed and admitted to practice in the State of Iowa with offices located in Newton, Iowa. On March 22, 1985 upon petition she was appointed to act as guardian-ad-litem for five children in proceedings before the Juvenile Court in the Fifth Judicial District of Iowa.

The case concerned a dispute between a natural mother and foster parents and the Iowa Department of Human Services as to the appropriate placement and custody of the five children. The case became a clause celebre in Iowa and eventually commanded the attention of the national press including the CBS magazine program—*60*

Minutes. Proceedings in the case continued through 1985, 1986, and 1987 and the petitioner came to be interviewed in both the local Iowa press and on local and national television. The state trial court declined to terminate the parental rights of the natural mother or place the children with the foster parents and the petitioner acted as counsel on appeal of that decision to the Supreme Court of Iowa.

In January, 1987, while the appeal was pending in the Iowa Supreme Court a complaint was filed against the petitioner with a grievance committee of the Iowa Bar Association by respondents, a Special Assistant to the Attorney General, Gordon Allen, and a Deputy Commissioner of the Iowa Department of Human Services, Larry Jackson, complaining of public statements made by the petitioner which were allegedly critical of various public officials.

The petitioner responded to the complaint in February, 1987 and asserted a First Amendment defense. In August, 1987 the Committee on Professional Ethics and Conduct of the Iowa State Bar Association sent notice to the petitioner of a public reprimand. The petitioner thereupon filed the action which is the subject of this case in the United States District Court for the Southern District of Iowa on August 31, 1987. (Appendix, pp. 15-26)

The respondents, Committee on Professional Ethics and Conduct of the Iowa State Bar Association and the individual members of the Committee filed a Motion to Dismiss the complaint by date of September 18, 1987. The respondents, Allen and Jackson, also filed a Motion to Dismiss by date of September 22, 1987. Briefs were submitted by the parties and on October 30, 1987 the District Court rendered its memorandum opinion dismissing the

Complaint. (Appendix, pp. 7-12) From that opinion and subsequent order and judgment entered November 2, 1987 (Appendix, pp. 13-14) an appeal was taken to the United States Court of Appeals for the Eighth Circuit. (Appendix, p. 27) After the submission of briefs and presentation of oral argument the United States Court of Appeals for the Eighth Circuit issued its opinion on August 12, 1988. (Appendix, pp. 1-4)

REASONS FOR GRANTING THE WRIT

"A function of free speech under our system of government is to invite dispute. It may indeed better serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger. Speech is often provocative and challenging. It may strike at prejudices and preconceptions and have profound unsettling effects as it presses for acceptance of an idea. That is why freedom of speech, though not absolute, . . . is nevertheless protected against censorship or punishment, unless shown likely to produce a clear and present danger of a serious substantive evil that arises far above public inconvenience, annoyance, or unrest." *Terminiello v. City of Chicago*, 337 U.S. 1, 4-5 (1949).

I.

THE COMPLAINT SET FORTH A CAUSE OF ACTION—A CLEAR AND DIRECT INFRINGEMENT OF PROTECTED FREE SPEECH UNDER COLOR OF LAW.

The nature of the free speech infringement in the instant case is clearly of the type traditionally protected by the First Amendment under decisions of the United States

Supreme Court from early date. *Fiske v. Kansas*, 274 U.S. 380 (1927), *Stromberg v. California*, 283 U.S. 359 (1931), *Gitlow v. New York*, 268 U.S. 652 (1925), *Whitney v. California*, 274 U.S. 359 (1927), *Brandenburg v. Ohio*, 395 U.S. 444 (1969), *New York Times v. Sullivan*, 376 U.S. 254 (1964), *Thornhill v. Alabama*, 310 U.S. 88 (1940), *Terminiello v. City of Chicago*, 337 U.S. 1 (1949).

The infringement here is a direct abridgement of speech which, although perhaps provocative and challenging, is protected. *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964). Also see *Zwickler v. Koota*, 389 U.S. 241 (1967), *NAACP v. Button*, 371 U.S. 415 (1963), *Cantwell v. Connecticut*, 310 U.S. 296 (1940).

The "environment" of the particular case as noted to be important in *Healy v. James*, 408 U.S. 169 (1972), *Tinker v. Des Moines Independent School District*, 393 U.S. 503 (1969) and *Shelton v. Tucker*, 364 U.S. 479 (1960) in the case at bar is the vigorous debate surrounding an ongoing civil legal matter. To censure the legal counsel for speaking out on the matter is to clearly abridge free speech in a most fundamental sense. It is that concept that underlies the holding of the Circuit Courts of Appeals of the Fourth and Seventh Circuits in *Hirschkop v. Snead*, 594 F.2d 356 (4th Cir. 1979) and *Chicago Council of Lawyers v. Bauer*, 522 F.2d 242 (7th Cir. 1975) in directly striking down rules of professional conduct which attempt to prohibit or restrict comments made by attorneys in the course of *civil* litigation. Such rules inhibit free speech, restrict reasonable public debate, and have a chilling effect. Cf. *Zwickler v. Koota*, 389 U.S. 241 (1967), *Dombrowski v. Pfister*, 380 U.S. 479 (1965).

When such infringement is under color of law by action of agents of the state the victim may certainly obtain redress via an affirmative action in the United States District Court.

42 U.S.C. 1983 provides:

> "Every person, who, under color of any statute, ordinance, regulation, custom or useage, of any state or territory subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity or other proper proceeding for redress." 42 U.S.C. § 1983.

The petitioner brought the instant action against the respondents for violation of her First Amendment rights under color of law. The vindication of rights arising under the United States Constitution and federal laws is primarily for the federal courts. There is a duty which rests upon all levels of the federal judiciary to vindicate the First Amendment rights of a citizen in the face of oppression thereof. In *Zwickler v. Koota,* 389 U.S. 241 (1967) Justice Brennan declared:

> ". . . escape from that duty is not permissible merely because State Courts also have the solemn responsibility equally with the federal courts . . . 'to guard, enforce and protect every right granted or secured by the Constitution of the United States.' *Robb v. Connolly,* 111 U.S. 624, 637, 4 S.Ct. 544, 551, 28 L.Ed. 542. 'We yet like to believe that wherever the Federal Courts sit, human rights under the Federal Constitution are always a proper subject for adjudication and that we have not the right to decline the exercise of that jurisdiction simply because the rights may be adjudicated in some other forum.' "

In *Fair Assessment In Real Estate v. McNary*, 454 U.S. 100, 70 L.Ed.2d 271, 275 Mr. Justice Rehnquist observed:

> "Obviously § 1983 cut a broad swath. By its terms it gave a federal cause of action to prisoners, taxpayers or anyone else who was able to prove that his constitutional or federal rights had been denied by any state. In addition, the statute made no mention of any requirement that state remedies be exhausted before resort to the federal courts could be had. . . ."

Justice Rehnquist goes on to discuss those areas where abstention or deference has been found appropriate.

Justice Brennan in his concurring opinion, in *Fair Assessment* at footnote 11, 70 L.Ed.2d 288 states that the congressional policy pronouncement of the role of the federal courts in the federal system was born of a "more than a modest distrust of the state courts as protectors of federal rights." He notes that "Where Congress has granted the federal courts jurisdiction we are not free to repudiate that authority."

It is with this background that the appropriateness vel non of the District Court's conclusion that it lacked subject matter jurisdiction over the action must be viewed. The circumstances in the case at bar as set forth in the Complaint supplemented by the verified affidavit submitted clearly established that the petitioner was claiming a course of conduct by the respondents of harassment, bad faith and retaliation against her. There were no ongoing state court proceedings such as criminal prosecutions in which the federal court was requested to intrude. The harassment and sanction by reprimand by the respondents

was a fait accompli. The Supreme Court of Iowa had issued its reprimand on October 15, 1987.

Also of great significance is the well accepted principle that when the unconstitutionality of the particular state action under challenge is clear, a federal court need not abstain from addressing the constitutional issue in lieu of some other reviews availability. See *Thornburgh v. American College of Obstetricians & Gynecologists*, 106 S.Ct. 2169, 90 L.Ed.2d 777, 801 (1986). Certainly First Amendment rights have traditionally been considered with a reverance equal to those rights of privacy recognized and secured in *Thornburgh*. As Justice Blackman indicates in *Thornburgh* federal courts have a duty to apply the federal Constitution faithfully. Also see Justice Blackman concurring in *Pennzoil Co. v. Texaco, Inc.*, 107 S.Ct. 1519 at p. 1534 (4/6/87).

Since *Monroe v. Pape*, 365 U.S. 167, 5 L.Ed.2d 492, 81 S.Ct. 473 (1961) immediate resort to federal court has been authorized whenever state actions allegedly infringe constitutional rights and the state has not been allowed the confession and avoidance defense that it has a review process which if followed would afford relief.

> "It is immaterial whether conduct is legal or illegal as a matter of state law. Such claims are entitled to be adjudicated in the federal courts."

McNeese v. Board of Education, 373 U.S. 668, 674 (1963).

II.

THE OPINION OF THE EIGHTH CIRCUIT ERRONEOUSLY DECLINED TO ADDRESS THE PETITIONER'S CLAIM OF "BAD FAITH HARASSMENT OR OTHER EXCEPTIONAL CIRCUMSTANCES."

In *Middlesex County Ethics Committee v. Garden State Bar Association*, 457 U.S. 423, 73 L.Ed.2d 6, 102 S.Ct. 2515 (1982). Justice Rehnquist repeatedly asserts that a federal claim may be made out against whosoever might be responsible for injury to the First Amendment rights of an attorney *where there is bad faith, harassment or other exceptional circumstances.* This "bad faith" exception to lack of subject matter jurisdiction is recognized by implication by Justice Brennan in *District of Columbia Court of Appeals v. Feldman*, 460 U.S. 462 (1983) in footnote 16. *Feldman* is the case relied upon by the District Court in dismissing the complaint in the case at bar. The complaint in the case at bar specifically alleged a course of harassment and bad faith by the respondents.

In addition—perhaps more importantly—*District of Columbia Court of Appeals v. Feldman* did not involve First Amendment infringement claims—it involved bar *admission* rules and decisions. Justice Brennan specifically notes those allegations in the complaints that involved a general attack on the constitutionality of the Rules were *properly within* the subject matter jurisdiction of the Federal District Court. See 75 L.Ed.2d 206 at pp. 225-226.

It is respectfully submitted that had *Feldman* involved allegations of concerted course of conduct harassing the

applicants and infringing their First Amendment rights the holding would have confirmed the subject matter jurisdiction of the lower federal courts.

The District Court erred in concluding that it lacked subject matter jurisdiction over the action and the Opinion of the Eighth Circuit erred in declining to address the error of the District Court. The District Court had misapplied the holdings of the United States Supreme Court in *District of Columbia Court of Appeals v. Feldman*, 460 U.S. 462 (1983) and by implication *Middlesex County Ethics Committee v. Garden State Bar Association*, 457 U.S. 423 (1982) and ignored the holdings of *Hirschkop v. Snead*, 594 F.2d 356 (4th Cir. 1979) and *Chicago Council of Lawyers v. Bauer*, 522 F.2d 242 (7th Cir. 1975). A proper er consideration of that case law and the traditional concepts of First Amendment law embodied in *Zwickler v. Koota*, 389 U.S. 241 (1967), *Terminiello v. City of Chicago*, 337 U.S. 1 (1949), *Dombrowski v. Pfister*, 380 U.S. 479 (1965) and *Thornburgh v. American College of Obstetricians & Gynecologists*, 106 S.Ct. 2169, 90 L.Ed.2d 777, 801 (1986) compelled reversal of the District Court.

III.

THE OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT ERRONEOUSLY CONCLUDED THAT THE PETITIONER HAD CONCEDED THAT THE DEFENDANTS WERE IMMUNE.

In this respect the opinion of the Court of Appeals is perplexing, without precedential support, and contrary to the record. Although the District Court opinion had concluded that the defendants were immune from an award

of damages against them there was no holding that declaratory judgment or injunctive relief would be unavailable to the petitioner in the event she should prevail. Further and more importantly, the record discloses that the petitioner had filed a Notice of Appeal from the entire Opinion, Order, and Judgment of the District Court and, accordingly, was challenging the decision in its entirety. (Appendix, p. 28-29) Whether or not the respondents enjoyed immunities, qualified or absolute from *damages* would not bar the petitioner from declaratory judgment or injunctive relief and attorneys' fees under 42 U.S.C. § 1988. In addition there was no concession that the respondents enjoyed any immunity even from damages. Certainly the respondent Larry Jackson, the Deputy Commissioner of the Iowa Department of Human Services was not, by virtue of his employment, cloaked with any heretofore recognized immunity. If he was ultimately found to have injured the petitioner's First Amendment rights under color of law there is no precedent for absolving him from an award of damages.

In essence the opinion of the Eighth Circuit begged the question before it and avoided addressing the core issue by invoking a heretofore unrecognized doctrine of issue preclusion by waiver when there was no waiver of record.

———o———

CONCLUSION

For the foregoing reasons a Writ of Certiorari should issue to review the Opinion of the United States Court of Appeals for the Eighth Circuit.

Respectfully submitted,

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APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 87-2619

Jane Harlan Appellant, v. The Committee on Professional Ethics and Conduct of the Iowa State Bar Association, and its individual members thereof, Michael H. Figenshaw; John J. Greer; James L. Tyler; Karen E. Shaff; Marie Prince-Cohen; D. Carlton Shull; William C. Davison; Norman G. Bastemeyer; Mary Louise Petersen and Carolyn Sloan, in their individual and official capacities; Larry Jackson, Deputy Commissioner of the Iowa Department of Human Services, and Gorden E. Allen, Special Assistant Iowa Attorney General in their individual and official capacities, Appellees.	)	Appeal and Cross-Appeal from the United States District Court for the Southern District of Iowa.

No. 87-2702

Jane Harlan,
Appellee,

v.

The Committee on Professional Ethics and Conduct of the Iowa State Bar Association, and it individual members thereof, Michael H. Figenshaw; John J. Greer; James L. Tyler; Karen E. Shaff; Marie Prince-Cohen; D. Carlton Shull; William C. Davison; Norman G. Bastemeyer; Mary Louise Petersen and Carolyn Sloan, in their individual and official capacities,

Appellants,

Larry Jackson, Deputy Commissioner of the Iowa Department of Human Services, and Gorden E. Allen, Special Assistant Iowa Attorney General in their individual and official capacities.

Submitted: June 16, 1988
Filed: August 12, 1988

Before HEANEY and MAGILL, Circuit Judges, and LARSON,* Senior District Judge.

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* THE HONORABLE EARL R. LARSON, Senior United States District Judge for the District of Minnesota, sitting by designation.

PER CURIAM.

I. INTRODUCTION

Jane Harlan (Harlan) appeals the district court's[1] dismissal of her lawsuit against the Committee on Professional Ethics and Conduct of the Iowa State Bar Association (the Committee) for want of subject matter jurisdiction. Finding no error in law or fact, we affirm.

II. FACTS

Harlan, an Iowa attorney, was appointed guardian ad litem for five children in proceedings to determine custody and placement. After an Iowa juvenile court judge determined that the children's mentally-ill mother should be given custody instead of the foster parents, Harlan criticized that judge in the local media. As the case became a local (and later national) cause celebre, Harlan continued to publicly criticize various state officials, including the juvenile court judge who awarded custody, and the appellate judges hearing the appeal of the award of custody. While the appeal was pending, a grievance was filed against Harlan with the Committee, alleging that she had violated professional ethics by criticizing the juvenile court judge and state officials. Harlan responded by asserting a First Amendment defense. The Committee rejected Harlan's First Amendment claims, and sent her notice of their recommendation of public reprimand. The notice informed her that if she failed to challenge the Committee's decision within thirty days,

[1]The Honorable Lyle E. Strom, Chief Judge, United States District Court for the Southern District of Iowa.

the reprimand would be spread upon the records of the Iowa Supreme Court. *See* Iowa Supreme Court Rule 118.3. Harlan did not challenge the Committee's recommendation, either through the administrative procedures prescribed by the Iowa Supreme Court, or in the United States Supreme Court. As a result, a final order of Public Reprimand was entered by the Iowa Supreme Court on October 15, 1987. Harlan then filed this 42 U.S.C. § 1983 action for derogation of her First Amendment rights. The district court dismissed her lawsuit on the alternative grounds (1) that allowing Harlan's lawsuit to go forward would involve federal district court review of the Iowa Supreme Court's decision to censure a member of the Iowa Bar, a result prohibited by the doctrine of absention, and (2) that all the defendants were entitled to absolute immunity. This appeal followed.

III. DISCUSSION

Harlan has not challenged the district court's finding that the Committee and its individual members were absolutely immune from liability for damages. Her failure to do so precludes this court from re-examining the issue of immunity on appeal, *see Rubek v. Barnhart*, 814 F.2d 1283, 1285 (8th Cir. 1987), or overturning the district court's dismissal on immunity grounds, and thus is fatal to her appeal.

In view of this disposition, it is unnecessary to address Harlan's objection to the district court's conclusion regarding the doctrine of abstention.

We have considered appellee's request for Fed. R. Civ. P. 11 sanctions and do not find that they are war-

ranted in this case. Accordingly, the district court's decision dismissing Harlan's lawsuit is in all respects affirmed.

A true copy.

ATTEST: /s/ Robert D. St. Vrain
CLERK, U.S. COURT OF APPEALS,
EIGHTH CIRCUIT

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

JUDGMENT

No. 87-2619

Jane Harlan, Appellant, v. The Committee on Professional Ethics and Conduct of the Iowa State Bar Association, and its individual members thereof, Michael H. Figenshaw; John J. Greer; James L. Tyler; Karen E. Shaff; Marie Prince-Cohen; D. Carlton Shull; William C. Davison; Norman G. Bastemeyer; Mary Louise Petersen and Carolyn Sloan, in their individual and official capacities; Larry Jackson, Deputy Commissioner of the Iowa Department of Human Services, and Gorden E. Allen, Special Assistant Iowa Attorney General in their individual and official capacities, Appellees.	)	87-619-B Appeal and Cross-Appeal from the United States District Court for the Southern District of Iowa.

No. 87-2702

Jane Harlan, Appellee, v.	)
The Committee on Professional Ethics and Conduct of the Iowa State Bar Association, and its individual members thereof, Michael H. Figenshaw; John J. Greer; James L. Tyler; Karen E. Shaff; Marie Prince-Cohen; D. Carlton Shull; William C Davison; Norman G. Bastemeyer; Mary Louise Petersen and Carolyn Sloan, in their individual and official capacities, Appellants,	)
Larry Jackson, Deputy Commissioner of the Iowa Department of Human Services, and Gorden E. Allen, Special Assistant Iowa Attorney General in their individual and official capacities.	)

This appeal from the United States District Court was submitted on the record of the district court, briefs of the parties and was argued by counsel.

After consideration, it is ordered and adjudged that the judgment of the district court in this cause be affirmed in accordance with the opinion of this Court.

August 12, 1988

Appellees (Committee on Professional Ethics and Conduct) will recover from the appellant the sum of $54.42 for taxable costs on appeal.

Appellees (Gordon Allen and Larry Jackson) will recover from appellant the sum of $34.80 for taxable costs on appeal.

A True Copy.

ATTEST: /s/ Robert D. St. Vrain
CLERK, U. S. COURT OF APPEALS,
EIGHTH CIRCUIT.

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF IOWA
CENTRAL DIVISION

JANE HARLAN,	)	
	)	
Plaintiff,	)	CV. 87-619-B
	)	
v.	)	
	)	
THE COMMITTEE ON PROFESSIONAL ETHICS AND CONDUCT OF THE IOWA STATE BAR ASSOCIATION, et al.,	)	MEMORANDUM OPINION
	)	
Defendants.	)	

This matter is before the Court on the following motions to dismiss: the Committee on Professional Ethics and Conduct of the Iowa State Bar Association (the Ethics Committee) and the individual members of that Committee (Filing No. 3), and Gordon Allen and Larry Jackson (Filing No. 5). The defendant Ethics Committee has also filed a motion for Rule 11 sanctions against the plaintiff (Filing No. 3).

The controversy in this case concerns attorney disciplinary proceedings which culminated in the public reprimand of plaintiff, Jane Harlan. Gordon Allen and Larry Jackson, state officials, initiated the complaint with the Committee on Professional Ethics and Conduct of the Iowa State Bar Association[1] on January 27, 1987, alleging that

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[1] The Ethics Committee members are commissioners of the Supreme Court of Iowa, and are authorized to initiate, receive and process complaints filed against attorneys licensed to practice law in Iowa. Iowa State Court Rule 118.2.

plaintiff, Jane Harlan, violated various provisions of the Iowa Code of Professional Responsibility.

Harlan was notified of the complaint and responded to it on February 13, 1987. Harlan's response denied any unethical conduct and raised a First Amendment defense to the complaint. The Ethics Committee, following an investigation, voted to discipline Harlan by a reprimand. Harlan was notified of the decision of the Committee on August 26, 1987, and was informed that she had thirty days to challenge the decision. If no exceptions were filed within the thirty days, the reprimand would be forwarded to the Clerk of the Iowa Supreme Court and spread upon the records of that Court as a public reprimand. *See Iowa Supreme Court Rule* 118.3.

The Iowa Supreme Court Rules provide that if a reprimand is challenged, no report of the reprimand shall be made to the Clerk of the Court and the reprimand shall be stricken from the records. *Iowa Supreme Court Rule* 118.3.[2] Harlan failed to challenge the Committee's decision which would have stricken the reprimand from the records and prevented the Committee from filing the reprimand with the Iowa Supreme Court. Her failure to challenge the decision of the Committee has now resulted in a final order of reprimand being entered by the Iowa Supreme Court on October 15, 1987.

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[2] The rule further states: "The Committee on Professional Ethics and Conduct may, however, proceed further with any complaint against such attorney before the Grievance Commission. When a reprimand has been filed but exception is duty taken thereto, such reprimand shall not be admissible in evidence in any hearing before the Grievance Commission." *Iowa Supreme Court Rule* 118.3.

In considering a motion to dismiss under Fed.R.Civ.P. 12(b)(6), allegations in the complaint must be viewed in the light most favorable to plaintiff. *Fusco v. Xerox Corp.*, 676 F.2d 332, 334 (8th Cir. 1982). "[A] complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957) (footnote omitted). "Thus, as a practical matter, a dismissal under Rule 12(b)(6) is likely to be granted only in the unusual case in which a plaintiff includes allegations which show on the face of the complaint that there is some insuperable bar to relief." *Jackson Sawmill Co. v. United States*, 580 F.2d 302, 306 (8th Cir. 1978), *cert. denied*, 439 U.S. 1070 (1979).

States have a strong interest in regulating their state bars as lawyers are "essential to the primary governmental function of administering justice." *Goldfarb v. Virginia State Bar*, 421 U.S. 773, 792 (1975). Recognizing this important state interest, the United States Supreme Court has noted that "orders of a state court relating to the admission, discipline and disbarment of members of its bar may be reviewed only by the Supreme Court of United States on certiorari to the state court and not by means of an original action in a lower federal court." *District of Columbia Court of Appeals v. Feldman*, 460 U.S. 462, 482 n.16 (1983) (*quoting MacKay v. Nesbitt*, 412 F.2d 846 (9th Cir. 1969).

The *Feldman* case concerns state court regulation of attorneys. The Court held that United States District Courts lack subject matter jurisdiction to review state court decisions made in judicial proceedings. *Feldman*,

460 U.S. at 486. The Court stated that this rule holds even when constitutional claims exist if these claims are inextricably intertwined with the state court's decision in a judicial proceeding. *Id.* at 483-84 n.16.

The only exception recognized in *Feldman* is when a plaintiff does not directly challenge a state judicial decision or raise a claim which is inextricably intertwined with a judicial decision. In such an instance, a United States District Court may hear the case. In the area of attorney discipline, challenges to the constitutionality of state bar rules, for example, do not necessarily require a district court to review a final state court judgment. In such case, the district court would be called upon to simply assess the validity of a state rule promulgated in a nonjudicial proceeding. In such a case, the district court would not be reviewing a state court judicial decision and could properly hear the case. *Id.* at 486.

In this matter, however, Harlan's challenge is to a state court decision arising out of judicial proceedings.[3] For this Court to hear plaintiff's claim it would be, in essence, reviewing a final state court judgment. The United States District Courts do not have jurisdiction over challenges to state court decisions in cases arising out of judicial proceedings even if those challenges allege that the state court's action was unconstitutional. *Id.* at 486. *See also, Michaelis v. Nebraska State Bar Association*, 717

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[3] The proceedings in this matter involved a judicial inquiry in which the Committee, acting on behalf of the Iowa Supreme Court, "was called upon to investigate, declare and enforce 'liabilities as they [stood] on present or past facts and under laws supposed already to exist.'" *Feldman*, 460 U.S. at 479, *quoting Prentis v. Atlantic Coastline Co.*, 211 U.S. 210, 226 (1908).

F.2d 437 (8th Cir. 1983). Review of this matter in a federal court may be had only in the United States Supreme Court. 28 U.S.C. § 1257. As this matter called for the review of a final state court decision arising out of judicial proceedings, this Court lacks subject matter jurisdiction and must dismiss this action.

Apart from the question of this Court's jurisdiction in this matter, defendants have raised the issue of immunity. Defendant Ethics Committee claims absolute quasi-judicial immunity barring plaintiff's § 1983 and 1985 claims for damages. Defendants Jackson and Allen claim that absolute immunity is conferred upon them by Iowa Supreme Court Rule 118.19 which states in part:

> Members of the Grievance Commission, members of the Committee on Professional Ethics and Conducts, and their respective staffs shall be immune from suit for any conduct in the course of their official duties.

The Iowa Supreme Court has interpreted that this rule's intent and purpose is to "protect complainants, witnesses, members of the Grievance Commission, members of the Committee on Professional Ethics and Conduct, and their respective staffs from retaliatory litigation by investigated lawyers . . . ." *State v. Baker*, 293 N.W.2d 568, 576 (Iowa 1980).

It is clear that the defendants in this action are immune from liability for damages for filing the complaint and for assisting with the investigation (defendants Allen and Jackson) and for the processing of the complaint and disciplinary action (defendant Ethics Committee).

As this Court lacks subject matter jurisdiction over this action, the defendants' motions to dismiss will be

granted. The Court, however, will deny defendant Ethics Committee's motion for Rule 11 sanctions against the plaintiff. A separate order will be entered in accordance with this opinion.

DATED this 30th day of October, 1987.

BY THE COURT:

/s/ Lyle E. Strom
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
DISTRICT OF

JANE HARLAN

v.

THE COMMITTEE ON PROFESSIONAL ETHICS AND CONDUCT OF THE IOWA STATE BAR ASSOCIATION, et al

JUDGMENT IN A CIVIL CASE

CASE NUMBER: 87-619-B

[ ] *Jury Verdict.* This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

[X] *Decision by Court.* This action came to consideration before the Court. The issues have been considered and a decision has been rendered.

IT IS ORDERED AND ADJUDGED

that defendants' motions to dismiss are granted and plaintiff's complaint is hereby dismissed.

NOVEMBER 2, 1987
Date

JAMES R. ROSENBAUM
Clerk

/s/ Pat Bridges
(By) Deputy Clerk

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF IOWA CENTRAL DIVISION

JANE HARLAN,	)	
	)	
Plaintiff,	)	CV. 87-619-B
	)	
v.	)	
	)	
THE COMMITTEE ON PROFESSIONAL ETHICS AND CONDUCT OF THE IOWA STATE BAR ASSOCIATION, et al.,	)	ORDER
	)	
Defendants.	)	

Pursuant to the memorandum opinion entered herein this date,

IT IS HEREBY ORDERED that defendant's motions to dismiss are granted and plaintiff's complaint is dismissed.

IT IS FURTHER ORDERED that defendant Ethics Committee's motion for sanctions is overruled.

DATED this 30th day of October, 1987.

BY THE COURT:

/s/ Lyle E. Strom
LYLE E. STROM
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF IOWA

JANE HARLAN,
Plaintiff,
vs.

CIVIL ACTION
File No. 87-619-B
(Jury Trial Demanded)

The COMMITTEE OF PROFESSIONAL ETHICS OF THE IOWA STATE BAR ASSOCIATION and its individual members thereof, Michael H. Figenshaw, John J. Greer, James L. Tyler, Karen E. Shaff, Marie Prince-Cohen, D. Carlton Shull, William C. Davison, Forman G. Bastemeyer, Mary Louise Petersen, and Carolyn Sloan, in their individual and official capacities; LARRY JACKSON, Deputy Commissioner of the Iowa Department of Human Services, and GORDON E. ALLEN, Special Assistant Iowa Attorney General in their individual and official capacities,

Defendants.

COMPLAINT

1.

This is an action for declaratory and injunctive relief and damage pursuant to Article VI of the United States Constitution and 42 U.S.C. Secs. 1983, 1985, and 1988. Jurisdiction is predicated on the foregoing provisions of the law and further upon 28 U.S.C. 1331 and 1343 and Article III of the United States Constitution. The amount in controversy exclusive of interests and costs exceeds $10,000.00.

2.

JANE HARLAN is an adult citizen of the United States residing in the Southern District of Iowa and at all

times material herein was an attorney in good standing duly admitted and licensed to practice the profession of law.

3.

The members of the Committee on Professional Ethics and Conduct of the Iowa State Bar Association are appointed commissioners of the Supreme Court of Iowa to initiate or receive and process complaints against any attorney licensed to practice law in this state for alleged violations of the Iowa Code of Professional Responsibility for Lawyers and laws of the United States or the State of Iowa.

4.

Michael H. Figenshaw, John J. Greer, James L. Tyler, Karen E. Shaff, Marie Prince-Cohen, D. Carlton Shull, William C. Davison, Norman G. Bastemeyer, Mary Louise Petersen, and Carolyn Sloan are all adult citizens and residents of the State of Iowa. At all times material herein they did collectively comprise the Committee on Professional Ethics and Conduct of the Iowa State Bar Association with offices located at 1101 Fleming Building in the City of Des Moines, Polk County, Iowa. Said Committee was at all times material herein empowered by the Supreme Court of Iowa to initiate or receive and process complaints against any attorney licensed to practice law in this state.

5.

LARRY JACKSON is the Deputy Commissioner of the Iowa Department of Human Services with offices at

the Hoover State Office Building in Des Moines, Polk County, Iowa.

6.

GORDON E. ALLEN is a special assistant to the Iowa Attorney General with offices at the Hoover State Office Building in Des Moines, Polk County, Iowa.

7.

JANE HARLAN is engaged in the practice of law in an office located at 300 Midtown Building in the City of Newton, Jasper County, Iowa, and was engaged in said practice at all times material herein.

8.

On January 27, 1987, LARRY JACKSON and GORDON ALLEN filed a complaint concerning JANE HARLAN with the Committee on Professional Ethics and Conduct of the Iowa State Bar Association attached as Exhibit 1.

9.

All actions actually engaged in by the plaintiff constituted protected free speech and thus could not form the basis for disciplinary action. Said protected speech ultimately resulted in nationwide publicity of the mistreatment of children in the custody of the State of Iowa, and legislation improving their status.

10.

Said disciplinary action was initiated in bad faith to retaliate against the plaintiff for having exercised her

First Amendment Rights in criticizing public officials, public agencies, public policies, and for reporting on testimony which took place in public courtrooms.

11.

On February 13, 1987, the plaintiff filed an answer to the complaint against her which is hereinafter attached as Exhibit 2 raising her First Amendment defense to said complaint.

12.

On August 26, 1987, the plaintiff received correspondence from the Committee on Professional Ethics and Conduct of the Iowa State Bar Association indicating that she would be reprimanded for her conduct unless she took further action. All of the conduct complained of in the Committee's decision involved protected speech and is attached as Exhibits 3 and 4.

13.

Any further proceedings of the Committee will be brought not with any genuine expectation of their eventual success, but only to discourage the exercise of the plaintiff's protected rights, and presumably deter others who might otherwise be inclined to speak out.

14.

The Committee has no legitimate interest in prosecuting the disciplinary charges against the plaintiff. Its only real interest is in retaliating against the plaintiff and chilling her further speech.

15.

The acts of the defendants in this matter were under the color of law and in violation and contravention of the rights of the plaintiff under the Constitution of the United States and the First and Fourteenth Amendments thereof.

16.

The defendants and each of them knew or in the exercise of reasonable care should have known that their conduct was violative of the rights of the plaintiff. Because of the specialized knowledge and education of the defendants, the plaintiff believes that the participation of the individual defendants was reckless, malicious, and vindictive.

17.

As a direct and proximate result of the actions of the defendants, the plaintiff has sustained and continues to sustain severe damage and injury to her property and professional reputation, sustained disruption and injury to her employment, sustained extreme mental pain and emotional suffering and has been required to defend against the proceedings against her to her damage in the amount of $250,000.

WHEREFORE, plaintiff demands relief against the defendants and all of them jointly and severally as follows:

1. Declaratory and injunctive relief directing that the defendants have heretofore violated the constitutional rights of the plaintiff and enjoining the defendants from such violation and infringement in the future.

2. For compensatory damages in the amount of $250,000.00.

3. For punitive damages in the amount of $750,000.00.

4. For costs, disbursements and attorney's fees pursuant to the provisions of 42 U.S.C. Sec. 1988.

5. For such further relief as may be appropriate. Dated August 31, 1987.

Respectfully submitted,

/s/ Jane Harlan
Jane Harlan, pro se
300 Midtown Building
Newton, Iowa 50208
(515) 792-9934

THE IOWA STATE BAR ASSOCIATION

COMPLAINT

RE: Jane Harlan of Monroe, Iowa.

Grievance Commission
Iowa State Bar Association
1101 Fleming Building
Des Moines, Iowa 50309

We, Gordon E. Allen and Larry Jackson, upon best information and belief, hereby complain that Jane Harlan, whose address is 300 Midtown Building, Newton, Iowa, 50208, has violated the Rules, Ethics and Conduct of the Legal Profession. As background information, Ms. Harlan was appointed pursuant to Iowa Code § 232.89 as counsel and guardian ad litem for five children involved in a child-in-need-of-assistance proceeding before the Jasper County Juvenile Court. Those children were placed in the custody of the Department of Human Services and thereafter placed in foster care. Statutory review hearings of that disposition were held, with Ms. Harlan participating throughout the proceedings as guardian ad litem for the children.

Upon hearing that the Department intended to change the foster care placement pursuant to a plan to reunify the children with their natural mother, Ms. Harlan, on behalf of those children, filed in October of 1986, a motion requesting the Jasper County Juvenile Court to enjoin that change in foster placement. Ms. Harlan also filed on behalf of the children a petition to terminate the parental rights of the natural mother. Pending hearing on the petition, all parties agreed that no change in placement would occur. The petition was denied after hearing, and

filed December 31, 1986. Shortly after the entry of that order, the Department of Human Services changed the foster care placement.

Continuing since August 1986, in derogation of statutory and appellate remedies available to her clients, Ms. Harlan, assertedly on their behalf, has pursued extra-judicial remedies in the Governor's office and the court of public opinion by repeatedly requesting assistance with and commenting upon this case with members of the local and national media.

Specifically, it is believed Ms. Harlan has violated the Rules of Ethics and Conduct in the following respects:

In violation of DR7-107(G), Ms. Harlan, has continually, during the course of the juvenile court litigation, made or participated in making extra-judicial statements relating to the evidence, the character and credibility of parties and witnesses and her opinion as to the merits of the claims or defenses of these parties. Upon best information and belief, Ms. Harlan has commented repeatedly in the *Des Moines Register*, and has made comments on various radio "call-in" shows, including WHO in Des Moines and the Jim Fisher Show in Davenport. In addition, Ms. Harlan has contacted the Governor's Office and staff directly, demanding the Governor's involvement in this judicial proceeding. Inappropriate comments were made at local NOW chapter meetings and even the local K-Mart.

Much of the information released and publicly discussed, in violation of DR 1-102, was obtained from records protected as confidential under Iowa Code § 232.147, § 237.9, and §§ 235A.15 and .17, to which she had access

as court-appointed guardian ad litem. Her comments, reported in the *Des Moines Register,* disclosed facts regarding the natural mother's mental health history and the children, and information about those children contained within child abuse records. Subsequent to December 31, 1986, Ms. Harlan disclosed to local and national media the time and date of the children's move to different foster care placement and thereafter the location and circumstances of their new foster care placement. This is not an exhaustive list of specific examples.

In summary, but most importantly, Ms. Harlan's willingness to pursue extra-judicial remedies does substantial disservice to the integrity of the judicial system, violates the trust and confidence placed in her by the Juvenile Court, and ultimately is counterproductive to the children whose best interests she was appointed to protect.

Respectfully submitted,

/s/ Gordon E. Allen
Gordon E. Allen
Special Assist. Attorney General

/s/ Larry Jackson
Larry Jackson
Deputy Commissioner
Department of Human Services

JANE A. HARLAN
Attorney At Law
300 Midtown Building • Newton, Iowa 50208
Phone: (515) 792-9934
February 13, 1987

Grievance Commission
Iowa State Bar Association
1101 Fleming Building
Des Moines, Iowa 50309

Re: Answer to Complaint of
Larry Jackson and Gordon Allen

Dear Sir or Madame:

The complaint of Gordon Allen and Larry Jackson should be dismissed as frivolous because it is filled with inaccuracies, and represents an unethical effort to silence counsel in violation of her First Amendment Rights.

The inaccuracies are as follows:

1. No public statements about the case were made before the end of October, 1986.

2. No confidential information has been released by counsel. All factual statements have been based on public courtroom hearings and can be verified by transcripts. No items from confidential files have even been mentioned in the media by counsel with the exception of her description of Karen Cooper as having a "long history of mental illness." That fact was clearly brought out numerous times in a public courtroom. Ms. Cooper's relatives and attorney made many more damaging comments than anything attributed to this attorney.

3. All comments by counsel have dealt with public information, public agencies, public issues, and public policies within the protection of the First Amendment.

4. The national and local media were aware of the date and time of the children's move several hours before counsel. Upon information and belief the media camped at the Mick home for several days waiting for the move. Mrs. Mick was televised receiving the call in which that information was conveyed.

5. Counsel has not released the circumstances and location of the new foster home placements. Upon information and belief the media is not aware of the location at the present time. The circumstances or potential circumstances were released by the children and Larry Jackson of the Department of Human Services.

The First Amendment rights of attorneys concerning pending litigation are well established as evidenced by the attached opinion of Hirschkop vs. Snead, 594 F. 2d 356, (1979). Perhaps your committee should examine the ethical conduct of public officials and attorneys who file frivolous complaints in order to harass their adversaries.

/s/ Jane Harlan
Jane Harlan

THE
IOWA STATE BAR ASSOCIATION

Committee on Professional
Ethics and Conduct
Norman G. Bastemeyer, Administrator
1101 Fleming Building
Des Moines, Iowa 50309
1-515-243-3179

August 24, 1987

PERSONAL AND CONFIDENTIAL

Ms. Jane Harlan
Attorney at Law
300 Midtown Building
Newton, Iowa 50208

In Re: Our File No. 8687-189

Dear Ms. Harlan:

The above complaint against you came on for consideration by the Committee at its recent hearing meeting.

Following review of the allegations contained in the complaint, your response thereto, the Committee's investigation, and the file, it was the determination of the Committee that you be and hereby are publicly reprimanded for your conduct in making extrajudicial statements relating to the evidence, the character and credibility of the parties and witnesses and your opinion as to the merits of the claims or defenses of parties to a matter in which you appeared as the attorney for certain minor children, in violation of Disciplinary Rule DR 7-107(G); and for your conduct in making statements to the press concerning the judge hearing that matter, in violation of DR 8-102(B).

Your conduct as above described is also in violation of Canon 1 of the Iowa Code of Professional Responsibility for Lawyers as well as Disciplinary Rule DR 1-102(A)(6).

FOR THE COMMITTEE ON
PROFESSIONAL ETHICS
AND CONDUCT

/s/ Norman G. Bastemeyer

NGB/vle
Cert. P 707 166 049

THE IOWA STATE BAR ASSOCIATION

(SEAL)

Iowa Supreme Court
Grievance Commission
Carl V. Nielsen, Secretary
Cathy Kelly, Administrative Assistant
1101 Fleming Building
Des Moines, Iowa 50309
1-515-243-3179

August 24, 1987

Ms. Jane Harlan
Attorney at Law
300 Midtown Building
Newton, Iowa 50208

In Re: Our File No. 8687-189

Dear Ms. Harlan:

Pursuant to Supreme Court Rule 118.3, enclosed find a letter from the Committee on Professional Ethics and Conduct reprimanding you.

You hereby are notified that you have thirty (30) days from receipt of this letter to file exceptions with the Secretary of the Grievance Commission, 1101 Fleming Building,

Des Moines, Iowa, 50309, and if such exceptions are not filed within said period, the reprimand will be forwarded to the Clerk of the Supreme Court and spread upon the records of the Court as a public reprimand.

For your information, we are enclosing a copy of Supreme Court Rule 118.

/s/ Carl V. Nielsen
Carl V. Nielsen, Secretary
Grievance Commission

CVN/vle
Enclosures

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DIISTRICT OF IOWA
CENTRAL DIVISION

JANE HARLAN,

Plaintiff,

vs. Civil No. 87-619-B

THE COMMITTEE ON PROFESSIONAL ETHICS AND CONDUCT OF THE IOWA STATE BAR ASSOCIATION, and its individual members thereof, Michael H. Figenshaw, John J. Greer, James L. Tyler, Karen E. Shaff, Marie Prince-Cohen, D. Carlton Shull, William C. Davison, Norman G. Bastemeyer, Mary Louise Petersen, and Carolyn Sloan, in their individual and official capacities; LARRY JACKSON, Deputy Commissioner of the Iowa Department of Human Services, and GORDON E. ALLEN, Special Assistant Iowa Attorney General, in their individual and official capacities,

Defendants.

NOTICE OF APPEAL

NOTICE IS HEREBY GIVEN THAT JANE HARLAN, plaintiff above named hereby appeals to the United States Court of Appeals for the Eighth Circuit from the decision and order dated October 30, 1987, of the United States District Court for the Southern District of Iowa, the Honorable Lyle E. Strom, judge presiding.

Dated at Newton, Iowa, November 30, 1987.

1409 E. Capitol Drive
Milwaukee, Wisconsin 53211
(414) 961-0802

SUTTON & KELLY
Robert E. Sutton
Attorneys for Plaintiff

300 Midtown Building
Newton, Iowa 50208
(515) 792-9934

/s/ Jane Harlan
Jane Harlan, pro se

I hereby certify that I mailed a copy of the Notice of Appeal in the attorneys of record as are listed on the docket in this case. James R. Rosenbaum, Clerk By:

/s/ L. (ILLEGIBLE), Deputy Clerk

District 863, Off. 4, Doc. No. Yr. 87-0619, Or. 1
Filing Date 8/31/87 j 3, Nature Suit 440, $ Demand Thou. 1,000,
Judge 6711, County 19099, Jury Dem. P Yr. 87, Doc. No. 619-B

CAUSE: PLAINTIFFS

HARLAN, JANE

JURY

Sep. 17, 1987 864-3421

ASSIGNED TO
JUDGE LYLE STROM
U. S. DISTRICT JUDGE
P. O. Box 607
Omaha, NE 68101

All Judge's copies to be mailed

DEFENDANTS
THE COMMITTEE ON PROFESSIONAL ETHICS AND CONDUCT OF the IOWA STATE BAR ASSOCIATION and its individual members thereof, Figenshaw, Michael H.; Greer, John J.; Tyler, James L.; Shaff, Karen E.; Prince-Cohen, Marie; Shull, D. Carlton; Davison, William C.; Bastemeyer, Norman G.: Petersen, Mary Louise, and Sloan, Carolyn, in their individual and official capacities; JACKSON, LARRY, Deputy Commissioner of the Iowa Department of Human Services, and ALLEN, GORDEN E., Special Assistant Iowa Attorney General in their individual and official capacities

CAUSE
(CITE THE U.S. CIVIL STATUTE UNDER WHICH THE CASE IS FILED AND WRITE A BRIEF STATEMENT OF CAUSE)
Civil Rights action filed under Sections 42 U.S.C. 1983, 1985 and 1988.

JANE HARLAN (Pro Se)
Attorney at Law
300 Midtown Building
Newton, Iowa 50208
(515) 792-9934

Robert E. Sutton (9/28/87)
Sutton & Kelly
1409 E. Capitol Drive
Milwaukee, WI 53211
(414) 961-0802

Attorneys for def. Committee on Prof. Ethics & Its Individual members:
James Gritzner
Nyemaster . . . law Firm
1900 Hub Tower
Des Moines, IA 50309
283-3145

for defs. G. Allen &
L. Jackson:

Thomas J. Miller, Atty. Gen.
Eleanor Lynn, Asst.
Tort Claims Division
Hoover State Office Bldg.
Des Moines, IA 50319
281-5881

STATISTICAL CARDS

CARD	DATE MAILED
JS-5	8/31/87
JS-6	11/ 2/87

Civ. #87-619-B

Date	NR	Proceedings
		Harlan, Jane Committee on Professional Ethics IA State Bar, et al.
8/31/87	1	Complaint. Jury Demand. Summons issued.
8/31/87	2	Application for Preliminary Injunction.
9/18/87	3	M/Dismiss and For Rule 11 Sanctions (Oral Argument Requested) by Comm. on Prof. Ethics . . . & individual members.
9/18/87	4	Brief in Support of Def. Committee & Its Members' M/Dismiss . . .
9/23/87	5	M/Dismiss by defs. Allen & Jackson.
9/23/87	6	Memo. in Support of M/Dismiss of Defs. Allen & Jackson.
9/28/87	7	Notice of Appearance and Notice of Associate Counsel.
9/28/87	8	M/Withdraw Application for Prelim. Injunction.
9/29/87	9	Order granting m/withdraw app. for prelim. inj.; all briefs in support of or opposition to defs.' m/dismiss & for Rule 11 sanctions by 10/20/87. /s/ Strom J. Copy to attys.

10/20/87	10	Memo of Pltf. in Opposition to Mnts. of all Defs. to Dismiss and for Rule 11 Sanctions.
10/20/87	11	Affidavit of Pltf.
11/ 2/87	12	Memorandum Opinion—As this Court lacks subject matter jurisdiction over this action, the defts' motions to dismiss will be granted. The Court will deny deft. Ethics Committee's motion for Rule 11 sanction against the pltf. /s/ Lyle E. Strom, Judge. Copies to Counsel.
11/ 2/87	13	Order—It is hereby Ordered that defts' motions to dismiss are granted and pltf's complaint is dismissed. It is Further Ordered that deft. Ethics Committee's motion for sanctions is overruled. /s/ Lyle E. Strom, Judge. Copies to Counsel. 153-OJ-8.
11/ 2/87	14	Judgment—It is Ordered and Adjudged that defts' motions to dismiss are granted and pltf's complaint is dismissed. /s/ JRR, Clerk. Pat Bridges, Deputy Clerk. Copies to Counsel. 153-OJ-9.
11/30/87	15	Pltf's Notice of Appeal.

I hereby certify that I mailed a copy of the Notice of Appeal to the attorneys of record as are listed on the docket in this case. James R. Rosenbaum, Clerk By: /s/ L.....(ILLEGIBLE) ....., Deputy Clerk

PLEASE NOTE:
PROCEEDING ON
CLERK'S RECORD — Send original and one copy of designation to Des Moines wth copy to Circuit.
PROCEEDING ON
APPENDIX and original to Ck. with two copies to Des Moines.

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF IOWA CENTRAL DIVISION

JANE HARLAN,

Plaintiff,

vs.

Cv. 87-619-B

THE COMMITTEE ON PROFESSIONAL ETHICS AND CONDUCT OF THE IOWA STATE BAR ASSOCIATION, et al.,

AFFIDAVIT OF PLAINTIFF

Defendants.

STATE OF IOWA)
) SS.
COUNTY OF JASPER)

Jane A. Harlan, being duly sworn, deposes and states:

1. I am the plaintiff in the above-entitled action.

2. I am an attorney licensed to practice law in the State of Iowa since 1984 with offices at 300 Midtown Building, Newton, Iowa 50208.

3. On March 22, 1985, I was appointed the attorney and guardian ad litem for five minor children, Anna, Amanda, Sarah, Samantha, and Justin Cooper. I represented the children in the Jasper County Juvenile Court until I was removed on February 17, 1987, and still represent them before the Iowa Supreme Court.

4. My first comments in the media concerning my child clients appeared on October 30, 1986. At that time I described the testimony of two of the children in a public courtroom in the spring of 1985. I further criticized the treatment of my clients by the Iowa Department of Human Services. In every instance my statements were accurate, truthful, and involved public information.

5. Gerald Fuerhelm, the attorney for the natural mother, was quoted in the Des Moines Register on October 31, 1986. He told of a "substantiated incident" of abuse on the part of his client involving information straight from the confidential files of the Iowa Department of Human Services. On subsequent occasions he told of his client's treatment history for mental illness. He also entertained my child clients at his home and at Walt Disney's World on Ice without my knowledge or consent. No disciplinary action was ever instituted against him even though he clearly released confidential information, violated ethical rules, and was featured in the media at least as much as what I was.

6. District Associate Judge Thomas Mott, who handled the children's case, never directed me to not talk to the media concerning the case, or even discussed with me the propriety or accuracy of any of my public comments before April of 1987. At that time discussion centered on my public comments about him, not anything concerning the children.

7. On November 18, 1986, I was quoted in the press as stating that I couldn't understand why I was being sued by the natural mother since I had only told of events occurring in a public courtroom.

8. Subsequent comments were confined almost entirely to discussing the issues surrounding the case without giving direct information from any source.

9. On January 5, 1987, I told the press that I would appeal the court's decisions concerning my clients. I was critical of the actions of the Department of Human Services in the press when my clients were removed from their foster home on January 8, 1987.

10. On January 7, 1987, I filed the notice of appeal on the children's case.

11. Iowa Governor Terry Branstad announced on television on or about January 19, 1987, that I should be investigated for my conduct on the case. Upon information and belief the Governor is a graduate of Drake University Law School and a licensed attorney.

12. On January 27, 1987, the complaint involved in this action was sent to the Grievance Commission of the Iowa Bar Association signed by Gordon Allen, Special Assistant to the Attorney General, and Larry Jackson, Deputy Commissioner of the Iowa Department of Human Services. Neither party contacted me in advance to taking this action or objected to the accuracy of anything that I had said. The filing of this complaint caused me considerable anguish partly because it interfered with my ability to focus on the children's appeal.

13. On January 23, 1987, I met with Doug Gross, an assistant to Governor Branstad, concerning the case because I thought that it was not improper to petition the Governor concerning the actions of a state agency. At no

time did I release any information from any confidential file that was not publicly available.

14. On February 13, 1987, I responded to the Bar Complaint against me and raised my First Amendment defense. I enclosed a copy of *Hirschkop v. Snead,* 594 F.2d 356 (1979).

15. Any statement that I made at either a public meeting or to my personal friends was accurate and limited to public information.

16. The fact that the complaint mentions what I might have said at K-Mart demonstrates harassment on the part of state officials. Such statements would have been beyond the legitimate concern of the Bar Association. Such information was obviously acquired by investigation and interrogation.

17. On February 16, 1987, a hearing was held in Jasper County Juvenile Court on a motion filed by the State requesting that I be removed as the children's attorney. The motion was granted at least in part because of false findings by the Court that I had released confidential information about the case. No proof of this had been offered into evidence.

18. On March 16, 1987, I met with Megan Antenucci from the Grievance and Ethics Committee. I gave her copies of transcripts from the public hearings to verify that everything stated by me and repeated by the press was public information. I also pointed out that the confidential files in the case did not even contain what I had talked about, except that the natural mother had been mentally ill and neglectful of the children. Those facts

had been brought out many times in a public courtroom. I brought to the attention of Ms. Antenucci the unconstitutionality of the disciplinary rules relied on and cited authority for that position. Ms. Antenucci stated that the grievance committee could perhaps be persuaded to stay their proceedings against me until after a decision had been reached on the suit against me by the natural mother and my First Amendment rights had been tested in an Iowa court. I also told her how employees of the Department of Human Services and District Associate Judge Thomas Mott had harassed me while I was working on the appeal. My visits with my clients had been monitored. I had been fired as the children's attorney based on erroneous findings for which no evidence had been introduced. I was given no opportunity to rebut the court's findings which raised issues for the first time which had not been discussed at the hearing.

19. On March 23, 1987, Associate District Judge Thomas Mott issued an order where my fees on the children's case were reduced from $5,700.00 to $500.00 for 95 hours of service since May 20, 1986. I described this action in the media as "retaliation" which I firmly believe it was. This was the only time in which I was directly critical of the court in the media.

20. The reply brief on the children's appeal was due on August 3, 1987, and submitted on schedule. On August 18, 1987, the Iowa Supreme Court directed me to explain my authority to represent the children on appeal.

21. Six days later, on August 24, the Bar Association sent me its decision to publicly reprimand me after 30 days if I did not resist. No hearing or opportunity to defend

their allegations had been provided. On August 31, 1987, I filed this action in Federal Court. On September 3, 1987, I wrote a letter to the Bar Association objecting to the unconstitutionality of the rules that I was being reprimanded under. Under the rules of the Professional Ethics and Conduct Committee timely exception to the reprimand should have prevented submission of the reprimand to the Supreme Court at that time.

22. On August 31, 1987, I replied to the Iowa Supreme Court concerning my authority to represent the children on appeal. I cited the questionable circumstances of my removal at the District level and that I remained the attorney of choice for my clients. I also moved for an expedited appeal.

23. On September 15 the Iowa Supreme Court ordered that oral argument take place on October 13, and it proceeded on schedule. However my visit to my clients on October 8 was both monitored and videotaped by state officials.

24. The Order of Public Reprimand was issued by the Iowa Supreme Court on October 15, 1987, exactly two days after oral argument on the children's appeal. The documents sent to me are attached. I feel that the Bar not only violated my constitutional rights; it also violated its own rules of procedure concerning my right to a hearing. I also feel that this was a deliberate effort on the part of the Bar to distract me from completing the children's appeal and discredit me with the Supreme Court right when the children's case was submitted.

25. The actions of the defendants in this matter were part of a pattern of harassment engaged in by state offi-

cials under color of state law to intimidate me for asserting my client's rights, appealing their case, and criticizing the Governor and Iowa Department of Human Services.

26. I had a single conversation with Defendant Gordon Allen in about the middle of January, 1987. He complained about my "ethics", but did not indicate any intentions concerning the filing of a grievance. He did not challenge the accuracy of any of my statements.

27. The defendant Larry Jackson had no contact with me whatsoever.

28. Defendant members of the Bar Ethics Committee knew or should have known that the complaint against me was frivolous and unlawful. They proceeded with it anyway in an effort to intimidate and harass me. I was singled out for selective treatment not because of my conduct, but because I had taken public positions critical of the Governor, the State of Iowa, and the Iowa Department of Human Services.

/s/ Jane Harlan
Jane Harlan, Plaintiff

Subscribed and Sworn to Before Me this 19th day of October, 1987.

/s/ Nancy L. Cox
Notary Public

THE IOWA STATE BAR ASSOCIATION
(SEAL)

Committee on Professional
Ethics and Conduct
Norman G. Bastemeyer, Administrator
1101 Fleming Building
Des Moines, Iowa 50309
1-515-243-3179

August 24, 1987

PERSONAL AND CONFIDENTIAL

Ms. Jane Harlan
Attorney at Law
300 Midtown Building
Newton, Iowa 50208

In Re: Our File No. 8687-189

Dear Ms. Harlan: 87-1350

The above complaint against you came on for consideration by the Committee at its recent hearing meeting.

Following review of the allegations contained in the complaint, your response thereto, the Committee's investigation, and the file, it was the determination of the Committee that you be and hereby are publicly reprimanded for your conduct in making extrajudicial statements relating to the evidence, the character and credibility of the parties and witnesses and your opinion as to the merits of the claims or defenses of parties to a matter in which you appeared as the attorney for certain minor children, in violation of Disciplinary Rule DR 7-107(G); and for your conduct in making statements to the press concerning the judge hearing that matter, in violation of DR 8-102(B).

Your conduct as above described is also in violation of Canon I of the Iowa Code of Professional Responsibil-

ity for Lawyers as well as Disciplinary Rule DR 1-102 (A)(6).

FOR THE COMMITTEE ON
PROFESSIONAL ETHICS AND
CONDUCT

/s/ Norman G. Bastemeyer

NGB/vle
Cert. P 707 166 049

JANE A. HARLAN
Attorney at Law
300 Midtown Building - Newton, Iowa 50208
Phone: (515) 792-9934

September 3, 1987

Carl V. Nielsen
Iowa State Bar Association
1101 Fleming Building
Des Moines, Iowa 50309

Re: File No. 8687-189

Dear Mr. Nielsen:

I have received your letter of reprimand of August 24. Thank you for informing me of the kind of "ethics" valued by the Iowa Bar. Since when did a bunch of outdated unconstitutional ethical rules take priority over the welfare of the children in this state?

The actions of your committee in this matter have done more to discredit the legal profession than anything that I could say or anything that I could do. No, I have no intention of keeping any of your future activities "confidential".

Sincerely,

/s/ Jane Harlan
Jane Harlan

IN THE SUPREME COURT OF IOWA

IN THE MATTER OF	)	
JANE HARLAN,	)	No. 87-1350
A Practicing Attorney	)	ORDER OF PUBLIC
	)	REPRIMAND

Pursuant to Court Rule 118.3 the attached reprimand of attorney Jane Harlan by the Committee on Professional Ethics and Conduct has been filed with the clerk of this court together with proof of service thereof and a statement that no exception has been filed within the time prescribed.

It is therefore ORDERED that the reprimand of Jane Harlan be spread upon the records of this court as a public document.

Dated this 15 day of October, 1987.

THE SUPREME COURT OF IOWA
By /s/ Arthur A. McGiverin
Arthur A. McGiverin, Chief Justice

Copies to:

Members of the Court
Client Security and
Attorney Disciplinary Commission
Norman G. Bastemeyer
James E. Gritzner
Jane Harlan

Certified No. 198055

No. 88-769

Supreme Court, U.S.
FILED
DEC 5 1988
JOSEPH F. SPANIOL, JR.
CLERK

In The

Supreme Court of the United States

October Term, 1988

JANE HARLAN,

Petitioner,

vs.

THE COMMITTEE ON PROFESSIONAL ETHICS AND CONDUCT OF THE IOWA STATE BAR ASSOCIATION, and its individual members thereof, Michael H. Figenshaw, John J. Greer, James L. Tyler, Karen E. Shaff, Marie Prince-Cohen, D. Carlton Shull, William C. Davison, Norman G. Bastemeyer, Mary Louise Petersen, and Carolyn Sloan, in their individual and official capacities; LARRY JACKSON, Deputy Commissioner of the Iowa Department of Human Services, and GORDON E. ALLEN, Special Assistant Iowa Attorney General, in their individual and official capacities,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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QUESTIONS PRESENTED

1. Are the federal courts without subject matter jurisdiction to consider the issues raised by Harlan's complaint?

2. Are the members of the Ethics Committee absolutely immune from Harlan's claim for compensatory and punitive damages?

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No. 88-769

In The

Supreme Court of the United States

October Term, 1988

JANE HARLAN,

Petitioner,

vs.

THE COMMITTEE ON PROFESSIONAL ETHICS AND CONDUCT OF THE IOWA STATE BAR ASSOCIATION, and its individual members thereof, Michael H. Figenshaw, John J. Greer, James L. Tyler, Karen E. Shaff, Marie Prince-Cohen, D. Carlton Shull, William C. Davison, Norman G. Bastemeyer, Mary Louise Petersen, and Carolyn Sloan, in their individual and official capacities; LARRY JACKSON, Deputy Commissioner of the Iowa Department of Human Services, and GORDON E. ALLEN, Special Assistant Iowa Attorney General, in their individual and official capacities,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

The Iowa State Bar Association Committee on Professional Ethics and Conduct, on behalf of itself and its individual members, respectfully opposes the Petition for Writ of Certiorari to review the opinion and judgment of

the United States Court of Appeals for the Eighth Circuit entered in the above-captioned case on August 12, 1988.

OPINIONS BELOW

Neither the opinion of the Court of Appeals nor the opinion of the District Court has been reported. Both opinions, however, are reproduced in the Appendix to the Petition for Writ of Certiorari.

JURISDICTION

The Petition for Writ of Certiorari invokes this Court's jurisdiction under 28 U.S.C. section 1254.

PROVISIONS OF RULES INVOLVED

Iowa Sup. Ct. R. 118

Rules of the Grievance Commission of the Supreme Court of Iowa

Rules of Procedure of the Committee on Professional Ethics and Conduct of The Iowa State Bar Association

These rules are set forth in the Appendix to this brief.

STATEMENT OF THE CASE

The present controversy must be viewed against the backdrop of the well-defined, extensive, and

unchallenged procedures established by the Iowa Supreme Court for processing complaints of unethical behavior on the part of an attorney. Generally, these procedures, set forth fully in the Appendix to this brief, are first implicated when a complaint is filed with the Iowa State Bar Association Committee on Professional Ethics and Conduct (Ethics Committee or Committee). The Ethics Committee is a duly constituted arm of the Iowa Supreme Court whose members, upon selection, are formally appointed commissioners of that Court. Pursuant to Iowa Supreme Court Rule, the Committee is expressly authorized "to initiate or receive, and process complaints against any attorney licensed to practice law in Iowa for alleged violations of the Iowa Code of Professional Responsibility for Lawyers and laws of the United States or the state of Iowa." Iowa Sup. Ct. R. 118.2.

The Ethics Committee is charged with investigating potential ethical violations, and upon completion of an investigation has several courses of action available to it. Specifically, the Committee may (1) dismiss the complaint, (2) admonish the attorney, or (3) reprimand the attorney. The Committee may also file a formal complaint with the Supreme Court Grievance Commission. Iowa Sup. Ct. R. 118.2.

If the Committee votes to reprimand an attorney, notice of the Committee's action must be given to the attorney through personal service or by restricted certified mail. The attorney must at the same time be notified of his or her right to, within thirty days, file exceptions to the decision of the Ethics Committee. Iowa Sup. Ct. R. 118.3.

The consequences of an attorney's decision with respect to filing exceptions have been clearly articulated by the Iowa Supreme Court. First, if an attorney fails to

file an exception, such failure constitutes a waiver of any further proceedings and establishes the attorney's consent that the reprimand be made final and public. Iowa Sup. Ct. R. 118.3.

By contrast, if an attorney takes timely exception to the Committee's reprimand and the Committee determines that no further action should be taken, the matter is effectively closed and the record is sealed. No finding of unethical behavior will be made public and no disciplinary action will be imposed. Iowa Sup. Ct. R. 118.3.

Finally, if an attorney files a timely exception to the Committee's reprimand and the Committee determines that further action should be taken, a complaint must be filed by the Committee with the Iowa Supreme Court Grievance Commission. Iowa Sup. Ct. R. 118.2. After the complaint is filed, an attorney is entitled to file an answer, to engage in a full range of discovery, to participate in a complete evidentiary hearing, and to file a post-hearing brief addressing all factual and legal issues raised in the disciplinary proceeding. *See* Iowa Sup. Ct. R. 118.5-.9.

The Grievance Commission then issues its decision, after which an attorney has an absolute right of appeal to the Iowa Supreme Court. Iowa Sup. Ct. R. 118.11. Review by the Iowa Supreme Court is de novo, Iowa Sup. Ct. R. 118.11, and may itself be followed by a timely petition for rehearing, Iowa R. App. P. 27. An attorney dissatisfied with the final decision of the Iowa Supreme Court then has the right to seek review of that decision in the United States Supreme Court. 28 U.S.C. § 1257.

It is within the context of this procedural backdrop that the present controversy had its genesis. On January 27, 1987, two Iowa State officials, Larry Jackson and Gordon Allen, filed a complaint with the Ethics Committee challenging the conduct of Iowa attorney Jane Harlan. Jackson and Allen asserted that Harlan had violated various provisions of the Iowa Code of Professional Responsibility when she "pursued extrajudicial remedies in the Governor's office and the court of public opinion by repeatedly requesting assistance with and commenting upon [an ongoing child custody] case with members of the local and national media." Petitioner's Appendix at 24.

The Ethics Committee notified Harlan of the complaint and requested that she respond to it. Harlan did respond, asserting that the complaint was frivolous and represented "an unethical effort to [harass and] silence [Harlan] in violation of her First Amendment rights." Petitioner's Appendix at 26.

Following its investigation, the Ethics Committee concluded some of the charges against Harlan were supported and voted to discipline Harlan by public reprimand. Harlan was promptly notified of the Committee's decision and of her right to, within thirty days, take exception to that decision. Harlan was further notified that "if such exceptions are not filed within [thirty days], the reprimand will be forwarded to the Clerk of the Supreme Court and spread upon the records of the Court as a public reprimand." Petitioner's Appendix at 29-30.

Harlan, however, did not challenge the Committee's decision.[1] Instead, only one week after being notified of the Committee's decision, Harlan filed the present lawsuit. Styled as a civil rights claim and brought under 42 U.S.C. sections 1983 and 1985, Harlan sought declaratory and injunctive relief as well as $1,000,000 in compensatory and punitive damages.

Because Harlan failed to challenge the decision of the Ethics Committee, a final order of public reprimand was entered by the Iowa Supreme Court on October 15, 1987. Following entry of that order, Harlan filed no petition for rehearing and failed to seek timely review by the United States Supreme Court.

In response to Harlan's federal action, the Ethics Committee filed a motion to dismiss. Central to its motion was the Committee's assertion that the District Court, pursuant to this Court's ruling in *District of Columbia Court of Appeals v. Feldman*, 460 U.S. 462, 103 S.Ct. 1303, 75 L.Ed.2d 206 (1983), lacked the jurisdictional authority to consider Harlan's complaint. The Committee also asserted the members of the Committee were entitled to absolute quasi-judicial immunity from Harlan's claim for compensatory and punitive damages.

On October 30, 1987, the District Court granted the Committee's motion to dismiss, concluding it had no

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[1] Both the District Court and the Court of Appeals expressly found that Harlan failed to challenge the decision of the Ethics Committee. *See* Petitioner's Appendix at 4, 10. Harlan has not attempted to challenge this finding in her Petition for Writ of Certiorari.

subject matter jurisdiction to consider Harlan's complaint. The District Court also concluded the Ethics Committee and its individual members were absolutely immune from liability for damages.[2]

Harlan subsequently prosecuted an appeal in the Eighth Circuit Court of Appeals. That court affirmed the District Court's decision in an unpublished per curiam opinion. Following the Court of Appeals' decision, Harlan filed the Petition for Writ of Certiorari presently pending before this Court.

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[2] At the time the Committee filed its motion to dismiss, no final order of reprimand had been entered by the Iowa Supreme Court. Consequently, the Committee's motion also raised the issue of abstention. Well established precedent of this Court, including *Middlesex County Ethics Comm. v. Garden State Bar Ass'n.*, 457 U.S. 423, 102 S.Ct. 2515, 73 L.Ed.2d 116 (1982), and *Ohio Civil Rights Comm. v. Dayton Christian Schools*, 477 U.S. 619, 106 S.Ct. 2718, 91 L.Ed.2d 512 (1986), as well as the total lack of any factual basis to support Harlan's claim of bad faith or harassment on the part of the Committee, would have mandated that the District Court abstain in this case. Because the state proceedings were concluded prior to the District Court's decision, however, the issue of abstention was mooted and the issue of subject matter jurisdiction became controlling.

REASONS FOR DENYING THE WRIT

I.

THE QUESTION OF THE DISTRICT COURT'S SUBJECT MATTER JURISDICTION IS CONTROLLED BY WELL-ESTABLISHED UNITED STATES SUPREME COURT PRECEDENT, RAISES NO SPECIAL AND IMPORTANT REASONS TO GRANT HARLAN'S CERTIORARI PETITION, AND WAS PROPERLY RESOLVED BY THE DISTRICT COURT.

A.

THE QUESTION OF THE DISTRICT COURT'S SUBJECT MATTER JURISDICTION IMPLICATES NONE OF THE SPECIAL AND IMPORTANT REASONS FOR GRANTING A WRIT OF CERTIORARI IDENTIFIED IN UNITED STATES SUPREME COURT RULE 17.

Rule 17 of this Court provides that a writ of certiorari will be granted "only when there are special and important reasons therefore." Sup. Ct. R. 17. The rule identifies several very limited instances in which special and important reasons might be found to justify the granting of a certiorari writ. None of these special and important reasons are implicated with respect to the jurisdictional issue that lies at the heart of this case.

Here, the District Court, following the closely analogous *Feldman* decision, dismissed Harlan's Complaint for lack of subject matter jurisdiction. The Court of Appeals affirmed the District Court's decision in a per curiam opinion.

Because neither of the opinions issued in this case was published, neither decision is of any binding precedential value within the Eighth Circuit. Further, even

assuming the jurisdictional issue was wrongly decided, the unpublished, non-precedential nature of these decisions assures that no conflict presently exists between decisions in the Eighth Circuit and decisions in other federal and state courts.

An additional reason for denying Harlan's writ is the existence of well-established, closely analogous, and controlling United States Supreme Court precedent. Very simply, the *Feldman* decision addressed and resolved the jurisdictional issues involved in this case. The District Court was obligated to follow the *Feldman* decision, and, as detailed below, correctly applied the principles of *Feldman* to the jurisdictional issues raised in this case.

Clearly, no special and important reasons exist to justify this Court's review of the jurisdictional issue raised by Harlan's complaint. Consequently, this Court should refuse to accept certiorari with respect to the jurisdiction issue. Such refusal would conclude this litigation because all other issues raised in Harlan's petition presuppose the existence of subject matter jurisdiction.

B.

THE DISTRICT COURT PROPERLY CONCLUDED IT WAS WITHOUT SUBJECT MATTER JURISDICTION TO ENTERTAIN HARLAN'S COMPLAINT.

The extensive administrative and judicial procedures established by the Iowa Supreme Court entitled Harlan to litigate all factual and legal issues implicated in the disciplinary proceedings instituted against her. Such issues would have included any federal or state constitutional

questions. By foregoing these extensive procedures, Harlan waived all further state court proceedings and consented to the final order of public reprimand filed by the Iowa Supreme Court. Iowa Sup. Ct. R. 118.3.

Through her federal action, Harlan now seeks to circumvent the procedures established by the Iowa Supreme Court and litigate in federal court issues she had every right and opportunity to pursue in the state court proceedings. In so doing, Harlan effectively seeks to overturn the final order of public reprimand entered by the Iowa Supreme Court. This, she very simply cannot do.

In *District of Columbia Court of Appeals v. Feldman*, this Court bluntly stated: "[A] United States District Court has no authority to review final judgments of a state court in judicial proceedings. Review of such judgments may be had only in this Court." 460 U.S. 462, 482, 103 S.Ct. 1303, 1315, 75 L.Ed.2d 206, 222 (1983). This jurisdictional prohibition is virtually absolute and applies not only to complaints directly challenging a state court decision but also to complaints asserting federal constitutional claims that are inextricably intertwined with the state court decision. *Id.* at 482-83 n.16, 103 S.Ct. at 1315-16 n.16, 75 L.Ed.2d at 223-24 n.16.[3]

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[3] As the Ninth Circuit recently noted in *Worldwide Church of God v. McNair:*

> Claims are "inextricably intertwined" if the district court must "scrutinize not only the challenged rule itself, but the [state court's] application of the rule. . . ." If, in order to

(Continued on following page)

The clear dictates of *Feldman* can be avoided only with respect to those complaints challenging the facial validity of "state bar rules, promulgated by state courts in nonjudicial proceedings, which do not require review of a final state-court judgment in a particular case." *Id.* at 486, 103 S.Ct. at 1317, 75 L.Ed.2d at 225; *Cruza v. Supreme Court of South Carolina*, 813 F.2d 644, 646 (4th Cir. 1987). Even a general constitutional challenge may be precluded, however, if a state's res judicata principles would foreclose litigation of the issue. *Feldman*, 460 U.S. at 487-89, 103 S.Ct. at 1318, 75 L.Ed.2d at 225-26; *Nordgren v. Hafter*, 789 F.2d 334, 338 n.1 (5th Cir.), *cert. denied*, 479 U.S. 850, 107 S.Ct. 177, 93 L.Ed.2d 113 (1986).

Here, *Feldman*, as well as the numerous cases applying its clear dictates, compels the dismissal of Harlan's complaint. First, Harlan has never challenged the Committee's assertion that the underlying state action as well as the entire disciplinary process constituted judicial proceedings. Addressing this question of federal law, the District Court itself expressly concluded:

(Continued from previous page)

> resolve the claim, "the district court would have to go beyond mere review of the state rule *as promulgated*, to an examination of the rule *as applied* by the state court to the particular factual circumstances of [the plaintiff's] case," then the court lacks jurisdiction.

805 F.2d 888, 892 (9th Cir. 1986) (quoting *Razatos v. Colorado Supreme Court*, 746 F.2d 1429, 1433 (10th Cir. 1984) (emphasis in original), *cert. denied*, 471 U.S. 1016, 105 S.Ct. 2019, 85 L.Ed.2d 301 (1985)).

> The proceedings in this matter involved a judicial inquiry in which the Committee, acting on behalf of the Iowa Supreme Court, "was called upon to investigate, declare and enforce 'liabilities as they [stood] on present or past facts and under laws supposed already to exist.'"

Harlan v. Comm. on Professional Ethics & Conduct, No. 87-619-B, slip op. at 5 n.3 (S.D. Iowa Oct. 30, 1987) (quoting *Feldman*, 460 U.S. at 479, 103 S.Ct. at 1313, 75 L.Ed.2d at 221) (quoting *Prentis v. Atlantic Coast Lens Co.*, 211 U.S. 210, 226, 29 S.Ct. 67, 69, 53 L.Ed. 150, 158 (1908)).

The District Court's conclusion the state's inquiry was judicial in nature is clearly consistent with well-established federal precedent. *See, e.g., Feldman*, 460 U.S. at 476-82, 103 S.Ct. at 1311-14, 75 L.Ed.2d at 218-22; *Middlesex County Ethics Comm. v. Garden State Bar Ass'n.*, 457 U.S. 423, 431-34, 102 S.Ct. 2515, 2521-23, 73 L.Ed.2d 116, 124-26 (1982); *Nordgren*, 789 F.2d at 336-37; *Thomas v. Kadish*, 748 F.2d 276, 281-82 (5th Cir. 1983), *cert. denied*, 473 U.S. 907, 105 S.Ct. 3531, 87 L.Ed.2d 655 (1985); *Clulow v. Oklahoma*, 700 F.2d 1291, 1298 (10th Cir. 1983).

Because the Iowa Supreme Court's October 15, 1987, order completed the state's judicial inquiry, the United States Supreme Court and only the United States Supreme Court could review that decision. *See Feldman*, 460 U.S. at 482, 103 S.Ct. at 1315, 75 L.Ed.2d at 222. As *Feldman* itself made clear:

> . . . [o]rders of a state court relating to the admission, discipline, and disbarment of members of its bar may be reviewed only by the Supreme Court of the United States on certiorari to the state court, and not by means of an original action in a lower federal court.

Id. at 483 n.16, 103 S.Ct. at 1316 n.16, 75 L.Ed.2d at 223 n.16 (quoting *MacKay v. Nesbet*, 412 F.2d 846, 846 (9th Cir. 1969), *cert. denied*, 396 U.S. 960, 90 S.Ct. 435, 24 L.Ed.2d 425 (1970)). This rule controls even in those situations in which the state court action is itself challenged as unconstitutional. *Id.* at 486, 103 S.Ct. at 1317, 75 L.Ed.2d at 225.

Second, in contrast with that portion of the complaint in *Feldman* that asserted a particular rule was itself facially unconstitutional, *id.*, Harlan's complaint makes no general constitutional challenge to any provision of the Iowa Code of Professional Responsibility. Rather, outside of one oblique comment in paragraph 13 of her complaint, Harlan's complaint focuses wholly on the events underlying and giving rise to the state disciplinary proceedings. Specifically, Harlan's complaint asserts: (1) all her actions were protected by the First Amendment and could not form the basis for disciplinary action; (2) the disciplinary action was initiated in bad faith, without any genuine expectation of success, and in retaliation against her; and (3) the defendants knew or reasonably should have known their conduct was violative of her First Amendment rights. *See similarly id.* at 486-87, 103 S.Ct. at 1317-18, 75 L.Ed.2d at 225.

The very essence of these claims is that Harlan's actions were protected by the First Amendment and consequently no disciplinary action could constitutionally be taken against her. In other words, the relevant provisions of the Code of Professional Responsibility relied upon by the Ethics Committee could not constitutionally be applied to Harlan. This claim is inextricably intertwined with and would require the District Court to review the underlying state proceedings. "This the District Court

may not do." *Id.* at 483 n.16, 103 S.Ct. at 1315-16 n.16, 75 L.Ed.2d at 223 n.16.

Finally, Harlan does not and clearly could not claim the administrative and judicial procedures available under Iowa law failed to provide her a full and fair opportunity to litigate her First Amendment defense. As identified above, the Iowa Supreme Court has established extensive procedures under which an attorney is able to challenge and attack potential disciplinary action. Harlan points to nothing that would indicate these procedures preclude the Ethics Committee, the Grievance Commission, or the Iowa Supreme Court from considering properly raised issues of federal constitutional law. *See by contrast Robinson v. Ariyoshi*, 753 F.2d 1468, 1472 (9th Cir. 1985), *vacated on other grounds*, 477 U.S. 902, 106 S.Ct. 3269, 91 L.Ed.2d 560 (1986); *Wood v. Orange County*, 715 F.2d 1543, 1547 (11th Cir. 1983), *cert. denied*, 467 U.S. 1210, 104 S.Ct. 2398, 81 L.Ed.2d 355 (1984); *Miller v. Washington State Bar Ass'n.*, 679 F.2d 1313, 1316 (9th Cir. 1982) (in each of which a party had no reasonable opportunity to raise and litigate the federal constitutional question in the state court proceedings).

By jumping to federal court, Harlan simply bypassed and waived all opportunity to litigate her federal constitutional claim in the state proceedings. As a result, just as a failure to assert a federal constitutional issue during state judicial proceedings may bar United States Supreme Court review of a final state court decision, so too Harlan's deliberate decision to bypass available state proceedings bars her from relying on an unlitigated question of federal constitutional law as a basis for establishing

the subject matter jurisdiction of the District Court. *See Feldman*, 460 U.S. at 482 n.16, 103 S.Ct. at 1315-16 n.16, 75 L.Ed.2d at 223 n.16.

The District Court properly followed the dictates of *Feldman* in dismissing Harlan's complaint. To conclude otherwise would seriously undermine Iowa's attorney disciplinary process and would allow Harlan to attack collaterally a final state court decision entered in large part as a result of her own failure to take advantage of procedural protections and remedies established by the Iowa Supreme Court to protect her interests as well as the interests of the general public.

II.

ASSUMING SUBJECT MATTER JURISDICTION EXISTS, THE DISTRICT COURT PROPERLY CONCLUDED THE MEMBERS OF THE ETHICS COMMITTEE ARE ABSOLUTELY IMMUNE FROM HARLAN'S CLAIM FOR COMPENSATORY AND PUNITIVE DAMAGES.

A.

THE COURT OF APPEALS' RESOLUTION OF THE IMMUNITY ISSUE IMPLICATES NONE OF THE SPECIAL AND IMPORTANT REASONS FOR GRANTING A WRIT OF CERTIORARI IDENTIFIED IN UNITED STATES SUPREME COURT RULE 17.

The Court of Appeals affirmed the District Court's finding that the members of the Committee were immune from a claim for damages. It did so, however, not on the

basis of the issue's merits but because Harlan failed to raise and address the immunity issue in her appeal.

In reaching this result, the Court followed well-established Eighth Circuit precedent. *See, e.g., Rubek v. Barnhart*, 814 F.2d 1283, 1285 (9th Cir. 1987); *Burough v. Duluth Missabe & Iron Range Ry. Co.*, 762 F.2d 66, 68 n.1 (8th Cir. 1985). That precedent, which simply requires a party seeking reversal to identify and address issues relied upon as a basis for reversal, is consistently followed in the other federal circuits. *See, e.g., Collins v. City of San Diego*, 841 F.2d 337, 339 (9th Cir. 1988); *Travelers Indemnity Co. v. Atlantic Express Line*, 837 F.2d 187, 188 (5th Cir.), *cert. denied*, 57 U.S.L.W. 3259 (1988); *Appley v. West*, 832 F.2d 1021, 1030 (7th Cir. 1987); *McMurphy v. City of Flushing*, 802 F.2d 191, 198-99 (6th Cir. 1986). Consequently, the rule applied by the Court of Appeals to resolve the immunity question in no way conflicts with the rule applied in other federal courts, does not implicate an important, but undecided question, of federal law, and does not conflict with the decisions of this Court.[4]

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[4] The Court of Appeals clearly acted within its discretion in concluding Harlan had waived the immunity issue. Harlan's notice of appeal did not mention the immunity issue. Her statement of issues filed pursuant to Federal Rule of Appellate Procedure 10(b)(3) identified only the subject matter jurisdiction issue. Neither Harlan's initial brief nor her reply brief raised or addressed the immunity issue. Finally, during oral argument, Harlan addressed the immunity issue only after the Court expressly raised the question of waiver.

B.

EVEN ASSUMING THE COURT OF APPEALS ERRED IN NOT ADDRESSING THE MERITS OF THE IMMUNITY QUESTION, THAT ISSUE WAS PROPERLY ADDRESSED AND RESOLVED BY THE DISTRICT COURT.

Well-settled precedent of this Court establishes the absolute immunity from damages of state court judges and prosecutors. *Butz v. Economou*, 438 U.S. 478, 509-12, 98 S.Ct. 2894, 2911-13, 57 L.Ed.2d 895, 917-19 (1978); *Stump v. Sparkman*, 435 U.S. 349, 355-56, 98 S.Ct. 1099, 1104-05, 55 L.Ed.2d 331, 338-39 (1978). Members of administrative boards or commissions who perform judicial or quasi-judicial functions are likewise absolutely immune from claims for damages. *Butz*, 438 U.S. at 512-513, 98 S.Ct. at 2914, 57 L.Ed.2d at 920; *Vakas v. Rodriquez*, 728 F.2d 1293, 1296 (10th Cir.), *cert. denied*, 469 U.S. 981, 105 S.Ct. 384, 83 L.Ed.2d 319 (1984).

For a variety of reasons, the members of the Ethics Committee are also entitled to absolute quasi-judicial immunity from Harlan's claim for damages. First, in exercising their authority to take disciplinary action, members of the Committee perform quasi-judicial and quasi-prosecutorial functions. They also exercise by express delegation the Iowa Supreme Court's inherent and statutory authority to regulate the bar. *See* Iowa Const. Art. III, § 1, Iowa Code § 602.1206 (1987); Iowa Sup. Ct. Rule 121. As such, Committee members serve as an arm of the Iowa Supreme Court and shoulder much of the work that would otherwise fall on individual justices of the Iowa Supreme Court.

Second, as in *Butz*, well defined procedural protections built into the attorney disciplinary process eliminate the need for private damage actions as a means of remedying unconstitutional conduct. *See Butz*, 438 U.S. at 512-13, 98 S.Ct. at 2914, 57 L.Ed.2d at 920. These safeguards include the right to take exception to a Committee reprimand, the right to a full evidentiary hearing, and the right to de novo review before the Iowa Supreme Court. *See* Iowa Sup. Ct. Rules 118.2, 118.7, and 118.11. Further, any attorney aggrieved by a final disciplinary decision of the Iowa Supreme Court may seek review in the United States Supreme Court. 28 U.S.C. § 1257; *see In re Randall*, 640 F.2d 898, 901 (8th Cir.), *cert. denied*, 454 U.S. 880, 102 S.Ct. 361, 70 L.Ed.2d 189 (1981).

Finally, and again as in *Butz*, members of the Committee, like judges and prosecutors, are likely targets for those angered by their decisions. To ensure their continued independence as well as their willingness to serve, Committee members, who serve voluntarily and without pay, must be free to exercise their authority and discretion without fear of harassment or intimidation, *Butz*, 438 U.S. at 512, 98 S.Ct. at 2913, 57 L.Ed.2d at 919, and thus must be protected from the kind of suit here involved, *see State v. Baker*, 293 N.W.2d 568, 576 (Iowa 1980).

The District Court's conclusion that members of the Committee are entitled to absolute quasi-judicial immunity is entirely consistent with analogous circuit court precedent. *See Horwitz v. State Board of Medical Examiners*, 822 F.2d 1508, 1513-16 (10th Cir.), *cert. denied*, ___ U.S. ___, 108 S.Ct. 453, 98 L.Ed.2d 394 (1987); *Childs v. Reynoldson*, 777 F.2d 1305, 1306 (8th Cir. 1985); *Austin Municipal Sec. Inc. v. National Ass'n. of Sec. Dealers*, 757 F.2d 676, 690-91 (5th Cir. 1985);

Clulow v. Oklahoma, 700 F.2d 1291, 1298 (10th Cir. 1983); *Simons v. Bellinger*, 643 F.2d 774, 777-85 (D.C. Cir. 1980).

As a final note, the only recognized exception to the grant of absolute immunity from a claim for damages would require Harlan to demonstrate the Committee's actions were taken in the "clear absence of all jurisdiction." *Sparkman*, 435 U.S. at 357, 98 S.Ct. at 1105, 55 L.Ed.2d at 339. Harlan, however, has made no attempt to rely on this narrow exception and nothing in her complaint even remotely suggests its potential applicability.[5]

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[5] For purposes of lawsuits filed in Iowa state court, the Iowa Supreme Court has explicitly resolved the immunity issue. In Iowa Supreme Court Rule 118, the Court provided that "members of the committee on professional ethics and conduct shall be immune from suit for any conduct in the course of their official duties." Iowa Sup. Ct. R. 118.19.

CONCLUSION

As demonstrated, Harlan's petition identifies no special and important reason why a grant of certiorari is appropriate in this case. Further, the issues of subject matter jurisdiction and immunity were properly resolved below and are entirely consistent with well-established precedents of this Court. Consequently, the Ethics Committee respectfully requests that this Court deny Harlan's Petition for Writ of Certiorari.

Respectfully submitted,

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GRIEVANCE COMMISSION

Court Rule 118. Complaint procedure.

Referred to in Rules EC 2-11, DR 2-101, DR 2-105, Disciplinary Guidelines; Grievance Commission Rules 3 and 7, Appendix A; Ethics Procedure Rule 3.2; Ct.R. 121.2 "C" (5); 121.3 "d" (9), "i" (8); 121.4; 121.5 "a" (2); 123.5 "b"; Lawyer Mediator Rule 7B

Court Rule 118.1. Grievance Commission. There is hereby created the Grievance Commission of the Supreme Court of Iowa whose members shall be the Committee on Grievances of the Iowa State Bar Association, consisting of three lawyers from each judicial election district, to be appointed by the President-Elect of The Iowa State Bar Association, who shall designate one of them, annually, as chairman of the commission, and not less than five nor more than thirteen lay persons appointed by the court, and their successors as confirmed by order of this court. Such members are appointed commissioners of this court. The grievance commission, or a duly appointed division thereof shall hold hearings and receive evidence concerning alleged violations, wherever such violations occur, of the Iowa Code of Professional Responsibility for Lawyers or laws of the United States, and the laws of the state of Iowa or any other state or territory within their respective jurisdictions by lawyers who are members of the bar of this court. The grievance commission shall have such other powers and duties as are provided in these rules.

Court Rule 118.2. Processing of complaints. The members of the Committee on Professional Ethics and

Conduct of the Iowa State Bar Association, consisting of seven lawyers appointed by the President-elect of The Iowa State Bar Association, who shall designate one of them, annually, as chairman of the committee, and two lay persons appointed by the court, and their successors, as confirmed by order of this court are appointed commissioners of this court to initiate or receive, and process complaints against any attorney licensed to practice law in this state for alleged violations of the Iowa Code of Professional Responsibility for Lawyers and laws of the United States or the state of Iowa. Upon completion of any such investigation the committee on professional ethics and conduct shall either dismiss the complaint made, or admonish or reprimand the attorney, or file and prosecute the complaint before the grievance commission or any division thereof.

No member appointed to either the Committee on Professional Ethics and Conduct of the Iowa State Bar Association or the Grievance Commission of the Supreme Court of Iowa shall undertake to represent, in any stage of the investigative or disciplinary proceedings, any lawyer against whom an ethical complaint has been filed. To avoid even the appearance of impropriety, no member of the Committee on Professional Ethics and Conduct of the Iowa State Bar Association should undertake to represent any lawyer in any malpractice, criminal, or other matter where it appears that the filing of an ethical complaint against that lawyer is reasonably likely. A member of the Grievance Commission of the Supreme Court of Iowa may represent a lawyer in a malpractice, criminal, or other matter; however, a member must decline representation of the lawyer in any stage of the investigative or

disciplinary proceedings, and not participate in any hearing or other proceeding before the commission.

Referred to in R.Prob.P.5"d"

Court Rule 118.3. Reprimand. In event an attorney is reprimanded by the committee on professional ethics and conduct, a copy of the reprimand shall be filed with the clerk of the grievance commission who shall forthwith cause a copy of the reprimand to be served on the attorney by personal service in the manner of an original notice in civil suits or by restricted certified mail, with a notice attached stating that the attorney has thirty days from the date of completed service to file exceptions to the reprimand with the clerk of the grievance commission. Service shall be deemed completed on the date of personal service or the date shown by the postal receipt of delivery of the notice to the attorney. If the attorney fails to file an exception such failure shall constitute a waiver of any further proceedings and a consent that the reprimand be final and public. In that event, the clerk of the grievance commission shall cause a copy of the reprimand to be forwarded to the clerk of this court, together with proof of the aforesaid service thereof and a statement that no exceptions had been filed within the time prescribed. This court shall thereupon cause the reprimand to be spread upon the records of the court as a public document. In event, however, the attorney concerned files timely exception to the reprimand, no report of the reprimand shall be made to the clerk of this court and the reprimand shall be stricken from the records. The committee on professional ethics and conduct may, however, proceed further with any complaint against such

attorney before the grievance commission. When a reprimand has been filed but exception is duly taken thereto such reprimand shall not be admissible in evidence in any hearing before the grievance commission.

Court Rule 118.4. Rules. The grievance commission and the committee on professional ethics and conduct shall each adopt reasonable rules prescribing the procedure to be followed in all disciplinary proceedings before each such body, which rules shall be subject to approval by this court.

Court Rule 118.5. Complaints. Every complaint filed against an attorney with the grievance commission shall be signed and sworn to by the chairman of the committee on professional ethics and conduct and served upon the attorney concerned as provided by the rules of the grievance commission. Such complaints shall be sufficiently clear and specific in their charges to reasonably inform the attorney against whom the complaint is made of the misconduct he or she is alleged to have committed. All complaints, motions, pleadings, records, reports, exhibits, evidence and all other documents or things filed under this rule or received in evidence in a hearing before the grievance commission shall be filed with and preserved by the secretary of the grievance commission in Des Moines, Iowa, all of which shall at all times be available to this court or anyone designated by this court.

Referred to in Grievance Commission Rule 5

Court Rule 118.6. Discovery. In any disciplinary proceeding or action taken by the committee on professional ethics and conduct, discovery shall be permitted as provided in R.C.P. 121 to 134 inclusive; 140 and 141; and in

154 to 158. the attorney against whom a complaint has been filed, in addition to the restriction stated in R.C.P. 122(a) shall not be required to answer an interrogatory pursuant to R.C.P. 126; a request for admission pursuant to R.C.P. 127; a question upon oral examination pursuant to R.C.P. 140; or a question upon written interrogatories, pursuant to R.C.P. 150; if the answer would be self-incriminatory. In addition thereto, evidence and testimony may be perpetuated as provided in R.C.P. 159 to 166. If either party is to utilize discovery, it must be commenced within thirty days after service of the complaint. The commission may permit amendments to the complaint to conform to the proof or to raise new matters as long as the respondent has notice thereof and a reasonable time to prepare his defense thereto prior to the date set for hearing. The grievance commission, or any division thereof, shall receive an application and may enter an order to enforce discovery or to perpetuate any evidence. [Correction March 1983]

Court Rule 118.7. Hearing. After a complaint has been filed with the grievance commission and an answer filed thereto pursuant to its rules or the time provided for such answer has expired, the grievance commission shall immediately upon the expiration of thirty days from the date of service of the complaint set the matter for hearing and notify all parties therof at least ten days prior to the date of service of the complaint set the matter for hearing and notify all parties thereof at least ten days prior to the date set for such hearing, by restricted certified mail or personal service. If neither party has commenced any discovery within thirty days of the date of service of the complaint, the hearing shall be not less than forty-five days nor more than sixty days after the service of the

complaint. If a party has commenced discovery, the hearing shall be not less than sixty days nor more than seventy-five days after the service of the complaint. The commission may grant reasonable continuances but only upon written application supported by affidavit. Proceedings and hearings before the grievance commission or any division thereof shall be confidential unless the attorney involved requests otherwise.

In the event an attorney previously has been publicly reprimanded; or an attorney's license has been suspended, revoked, or he or she has been disbarred, a certified copy of said action shall be admitted into evidence at any hearing involving disciplinary proceedings without the necessity of a bifurcated hearing. The grievance commission and this court shall consider this evidence along with all other evidence in the case in determining the attorney's fitness or unfitness to practice law in the state of Iowa.

Court Rule 118.8. Subpoenas. The clerk of the district court of the county in which any disciplinary hearing is to be held shall issue subpoenas of all kinds upon request of the grievance commission, the complainant, or the attorney against whom a complaint has been filed. Any member of the grievance commission is hereby empowered to administer oaths to all witnesses, and shall cause such testimony to be officially reported by a court reporter. The grievance commission shall report to the response to any subpoena or any ruling of said commission.

Court Rule 118.9. Decision. At the conclusion of a hearing upon any complaint against an attorney, the

grievance commission shall dismiss the complaint, or recommend to this court that the attorney be reprimanded or the license to practice law of the accused attorney be suspended or revoked. If the grievance commission recommends reprimand of the attorney or recommends suspension or revocation of the attorney's license, it shall report to this court, in writing, its findings of fact, conclusions of law, and recommendations. A copy of this report shall also be filed with the client security and attorney disciplinary commission. The grievance commission may permit a reasonable time for the parties to file post-hearing briefs and arguments. The disposition or report of the commission shall be made or filed with this court within thirty days of the date set for the filing of the last responsive brief and argument. If the commission cannot reasonably make its determination or file its report within such time limit, it shall report that fact and the reasons therefor to the parties and the clerk of this court. Any determination or report of the commission need only be concurred in by a majority of the commissioners sitting. Any commissioner has the right to file with this court his or her dissent from the majority determination or report. Such matter shall then stand for final disposition in this court. If the grievance commission dismisses the complaint, no report shall be made to this court, except as provided in rule 118.20, however, the grievance commission shall, within ten days of its determination to dismiss, notify the complainant in writing of its report. If no appeal is applied for by the complainant within ten days after such notice, the grievance commission dismissal shall be final. Any report of reprimand or recommendations for license suspension or revocation

shall be a public document upon the filing thereof with the clerk of this court.

Referred to in Ct.R. 118.11; Grievance R. 14

Court Rule 118.10. Disposition by the supreme court. Any report filed by the grievance commission with this court shall be served upon the attorney concerned as provided by the rules of the grievance commission. Such report shall be entitled in the name of the complainant versus the accused attorney as the respondent. Within fourteen days after a report is filed with the clerk of this court, the secretary of the grievance commisssion shall transmit to the clerk of this court the entire record made before the commission. If no appeal is taken or application for permission to appeal is filed within ten days as provided in court rule 118.11, the court shall proceed to review de novo the record made before the commission and determine the matter without oral argument or further notice to the parties. Upon such review de novo the court may impose a lesser or greater sanction than the discipline recommended by the grievance commission.

This court may revoke or suspend the license of an attorney admitted to practice in Iowa upon any of the following grounds: conviction of a felony, conviction of a misdemeanor involving moral turpitude, violation of any provision of the Iowa Code of Professional Responsibility for Lawyers, or any cause now or hereafter provided by statute or these rules.

Referred to in Ct.R. 118.11

Court Rule 118.11. Appeal. The respondent may appeal from the report filed by the grievance commission pursuant to rule 118.9 to this court. Respondent's notice

of appeal must be filed with the secretary of the grievance commission within ten days after the report is filed with the clerk of this court. The respondent shall serve a copy of the notice of appeal on the complainant or its counsel pursuant to Iowa rule of appellate procedure 30. Promptly after filing notice of appeal with the secretary of the grievance commission respondent shall mail or deliver a copy of the notice of appeal to the clerk of the supreme court.

The complainant, within ten days after filing of final disposition of a case by the grievance commission, may apply to this court for permission to appeal from a ruling, report, or recommendation of the grievance commission. This court may grant such appeal in a manner similar to the granting of interlocutory appeals in civil cases under the Iowa rules of appellate procedure. The filing fee and the docket fee shall be waived upon complainant's written requests. If such appeal is from the grievance commission's dismissal of a complaint, or of any charge contained therein, such appeal shall remain confidential. In making such application the complainant shall refer to the respondent's initials, rather than respondent's name. All references to the respondent in briefs and oral arguments shall be by respondent's initials. In the event this court reverses or modifies the report of the grievance commission, such court order of reversal or modification shall become a public record.

After the filing of a notice of appeal or the granting of permission to appeal, the appeal shall proceed pursuant to the Iowa rules of appellate procedure to the full extent those rules are not inconsistent with this rule. Appellant shall cause the apppeal to be docketed within

ten days after the filing of notice of appeal or the granting of permission to appeal. The matter shall be docketed under the title given to the action before the grievance commission with the appellant identified as such pursuant to Iowa rule of appellate procedure 12(a). The abbreviated time limits specified in Iowa rule of appellate procedure 17 shall apply. Enlargements of time are not favored and shall not be granted except upon a verified showing of the most unusual and compelling circumstances. Review shall be de novo. If a respondent's appeal is dismissed for lack of prosecution pursuant to Iowa rule of appellate procedure 19 or for any other reason, this court shall proceed to review and decide the matter pursuant to court rule 118.10 as if no appeal had been taken.

Referred to in R. App. P. 12; Ct.R. 118.10; Grievance R. 14

Court Rule 118.12. Suspension. In event an order of this court provides for the suspension of the license of an attorney to practice law, such suspension shall continue for the minimum time specified in such order and until this court has approved the attorney's written application for reinstatement. In the order of suspension or by order at any time before reinstatement, this court may require the suspended attorney to meet reasonable conditions for reinstatement including, but not limited to, passing the Multistate Professional Responsibility Examination.

Any attorney suspended shall refrain, during such suspension, from all facets of the ordinary law practice including, but not limited to, the examination of abstracts; consummation of real estate transactions; preparation of legal briefs, deeds, buy and sell agreements,

contracts, wills, and tax returns; and acting as a fiduciary. Such suspended attorney may, however, act as a fiduciary for the estate, including a conservatorship or guardianship, of any person related to the suspended attorney within the second degree of affinity or consanguinity.

Nothing in this rule shall preclude an attorney, law firm, or professional association from employing a suspended attorney to perform such services only as may be ethically performed by lay persons employed in attorneys' offices, under the following conditions:

(a) The place of performance of such services shall be not less than one hundred miles from the suspended attorney's former law practice; and

(b) Notice of employment, together with a full job description, shall be provided to the committee on professional ethics and conduct of the Iowa State Bar Association before employment commences; and

(c) Informational reports, verified by the employer and employee, shall be submitted quarterly to the committee on professional ethics and conduct of the Iowa State Bar Association. Such reports shall contain a certification that no aspect of the employee's work has involved the unauthorized practice of law; and

(d) No suspended attorney shall have direct or personal association with any client, or shall disburse or otherwise handle funds or property of a client.

Typo corrected in paragraph (b) – "will" to "with" in November 87 Supp.

Court Rule 118.13. Application for reinstatement. An application for reinstatement from any suspension

shall be filed with the clerk of this court not more than sixty days prior to expiration of such suspension or time fixed for making application therefor in accordance with the provisions of court rule 117. In addition thereto the applicant shall state, in said application, that he or she has complied in all respects with the orders and judgments of this court relating to the suspension. The applicant shall also submit to this court satisfactory proof that he or she, at time of the application, is of good moral character and in all respects worthy of the right to practice law.

Court Rule 118.14. Conviction of a crime. Upon receipt by this court of satisfactory evidence that an attorney had pled guilty to, or nolo contendere to, or has been convicted of a crime which would be grounds for license suspension or revocation, such attorney may be temporarily suspended from the practice of law by this court regardless of the pendency of an appeal. Not less than twenty days prior to the effective date of such suspension, the attorney concerned shall be notified, in writing directed by restricted certified mail to his last address as shown by the records accessible to this court, that he has a right to appear before one or more justices of this court at a specified time, at a designated place and show cause why such suspension should not take place. Any hearing so held shall be informal and the strict rules of evidence shall not apply. The decision rendered may simply state the conclusion and decision of the participating justice or justices and may be orally delivered to the attorney at the close of the hearing or sent to him in written form at a later time.

Any attorney suspended pursuant to this rule shall refrain, during such suspension, from all facets of the ordinary law practice including, but not limited to, the examination of abstracts; consummation of real estate transactions; preparation of legal briefs, deeds, buy and sell agreements, contracts, wills and tax returns; and acting as a fiduciary. Such suspended attorney may, however, act as a fiduciary for the estate, including a conservatorship or guardianship, of any person related to the suspended attorney within the second degree of affinity or consanguinity.

For good cause shown, this court may set aside an order temporarily suspending an attorney from the practice of law as hereinabove provided, upon application by such attorney and hearing thereon in accordance with court rule 117, but such reinstatement shall neither terminate a disciplinary proceeding then pending nor stand as a bar to any such proceeding thereafter instituted against such attorney.

An attorney temporarily suspended under the aforesaid provisions of this rule shall be promptly reinstated upon the filing of a good and sufficient certificate disclosing the underlying conviction of a crime has been finally reversed or set aside, but such reinstatement shall neither terminate a disciplinary proceeding then pending nor stand as a bar to any such proceeding thereafter instituted against such attorney.

The clerk of any court in this state in which an attorney has pled guilty or nolo contendere to, or been convicted of a crime as aforesaid shall, within ten days

thereafter transmit a certificate thereof to the clerk of this court.

Court Rule 118.15. Disbarment on consent. An attorney subject to investigation or a pending proceeding involving allegations of misconduct subject to disciplinary action may acquiesce in his or her disbarment, but only by delivering to the grievance commission an affidavit stating he or she consents to disbarment and that

(1) The consent is freely and voluntarily given absent any coercion or duress, with full recognition of all implication attendant upon such consent;

(2) He or she is aware of a presently pending investigation into, or proceeding involving allegations that there exist grounds for discipline the nature of which shall be specifically set forth;

(3) He or she acknowledges the material facts so alleged are true; and

(4) In event proceedings were instituted upon the matters under investigation, or if existent proceedings were pursued, he or she could not successfully defend against same.

Upon receipt of such affidavit the grievance commission shall cause same to be filed with the clerk of this court whereupon this court shall enter an order disbarring such attorney on consent.

Any order disbarring an attorney on consent shall be a matter of public record. However, the affidavit required as aforesaid shall not be publicly disclosed or made available for use in any other proceeding except upon order of this court.

Court Rule 118.16. Disability suspension. In event an attorney shall at any time in any jurisdiction be duly adjudicated a mentally incapacitated person, or an alcoholic, or a drug addict, or shall be committed to an institution or hospital for treatment thereof, the clerk of any court in Iowa in which any such adjudication or commitment is entered shall, within ten days thereafter, certify same to the clerk of this court.

Upon the filing of any such certificate or a like certificate from another jurisdiction or upon determination by this court pursuant to a sworn application on behalf of a county bar association or the Committee on Professional Ethics and Conduct of the Iowa State Bar Association, that an attorney is not discharging professional responsibilities due to disability, incapacity, abandonment of practice, or disappearance, this court may enter an order suspending the license of such attorney to practice law in this state until further order of this court. Not less than twenty days prior to the effective date of such suspension, the attorney concerned or his or her guardian and the director of the insitution or hospital to which such attorney has been committed, if any, shall be notified, in writing directed by restricted certified mail to his or her last address as shown by the records accessible to this court, that the attorney has a right to appear before one or more justices of this court at a specified time, at a designated place and show cause why such suspension should not take place; provided, however, that, upon a showing of exigent circumstances, emergency or other compelling cause, the court may reduce or waive the twenty-day period and the effective date of action above referred to. Any hearing so held shall be informal and the

strict rules of evidence shall not apply. The decision rendered may simply state the conclusion and decision of the participating justice or justices and may be orally delivered to the attorney at the close of the hearing or sent to the attorney in written form at a later time. A copy of such suspension order shall be given the suspended attorney, or to his or her guardian and the director of the insitution or hospital to which such suspended attorney has been committed, if any, by restricted mail or personal service as this court may direct.

Any attorney suspended pursuant to this rule shall refrain, during such suspension, from all facets of the ordinary law practice including, but not limited to, the examination of abstracts; consummation of real estate transactions; preparation of legal briefs, deeds, buy and sell agreements, contracts, wills and tax returns; and acting as a fiduciary. Such suspended attorney may, however, act as a fiduciary for the estate, including a conservatorship or guardianship, of any person related to the suspended attorney within the second degree of affinity or consanguinity.

No attorney suspended due to disability under the aforesaid provisions of this rule may engage in the practice of law in this state until reinstated by order of this court.

Upon being notified of the suspension of the attorney, the chief judge in the judicial district in which the attorney practiced shall appoint a lawyer or lawyers to serve as trustee to inventory the files, sequester client funds, and take any other appropriate action to protect the interests of the clients and other affected persons.

Such appointment shall be subject to confirmation by the supreme court. The appointed lawyer shall serve as a special member of the Committee on Professional Ethics and Conduct of the Iowa State Bar Association and as a commissioner of the supreme court for the purposes of the appointment. The trustee may seek reasonable fees and reimbursement of costs of the trust from the suspended attorney. If reasonable efforts to collect such fees and costs are unsuccessful, the trustee may submit a claim for payment from the Clients' Security Trust Fund of the Bar of Iowa. The Client Security and Attorney Disciplinary Commission, in the exercise of its sole discretion, shall determine the merits of the claim and the amount of any payment from the fund. When the suspended attorney is reinstated to practice law in this state, or all pending representation of clients has been completed, or the purposes of the trust have been accomplished, the trustee may apply to the appointing chief judge for an order terminating the trust.

Any attorney so suspended shall be entitled to apply for reinstatement to active status once each year or at such shorter intervals as this court may, in the suspension order, provide or specify. An attorney suspended due to any aforesaid disability may be reinstated by this court upon a showing, by clear and convincing evidence, that the attorney's disability has been removed and he or she is fully qualified to resume the practice of law. Upon the filing of an application for reinstatement this court may take or direct any action deemed necessary or proper to determine whether such suspended attorney's disability has been removed, including a direction for an examination of the applicant by such qualified medical experts as

this court shall designate. In its discretion this court may direct that the expenses of such an examination be paid by the petitioning attorney.

The filing of an applicaiton for reinstatement to active status by an attorney suspended due to disability shall constitute a waiver of any doctor-patient privilege with regard to any treatment of the petitioning attorney during the period of his or her disability. Such attorney shall also set forth in his or her application for reinstatement the name of every psychiatrist, psychologist, physician and hospital or any other insitution by whom or in which the petitioning attorney has been examined or treated since his or her suspension due to disability, and shall also furnish to this court written consent that any such psychiatrist, psychologist, physician and hospital or other institution by whom or in which the petitioner has been examined or treated as aforesaid may divulge any and all information and records requested by this court or any court-appointed medical experts.

Where an attorney has been suspended due to any aforesaid disability and thereafter, in proceedings duly had, he or she shall be judicially held to be competent or cured, this court may dispense with further evidence regarding removal of his or her disability and may order his or her reinstatement to active status upon such terms as are deemed reasonably proper and advisable.

Court Rule 118.16A. Death or suspension of practicing attorney. Upon a sworn application on behalf of a county bar asociation or the Committee on Professional Ethics and Conduct of the Iowa State Bar Association

showing that a practicing attorney has died or been suspended or disbarred from the practice of law, and a reasonable necessity exists, the chief judge in the judicial district in which the attorney practiced shall appoint a lawyer or lawyers to serve as trustee to inventory the files, sequester client funds, and take any other appropriate action to protect the interests of the clients and other affected persons. Such appointment shall be subject to confirmation by the supreme court. The appointed lawyer shall serve as a special member of the Committee on Professional Ethics and Conduct of the Iowa State Bar Association as a commissioner of the supreme court for the purposes of the appointment. The trustee may seek reasonable fees and reimbursement of costs of the trust from the deceased attorney's estate or the attorney whose license to practice law has been suspended or revoked. If reasonable efforts to collect such fees and costs are unsuccessful, the trustee may submit a claim for payment from the Clients' Security Trust Fund of the Bar of Iowa. The Client Security and Attorney Disciplinary Commission, in the exercise of its sole discretion, shall determine the merits of the claim and the amount of any payment from the fund. When all pending representation of clients has been completed or the purposes of the trust have been accomplished, the trustee may apply to the appointing chief judge for an order terminating the trust.

Court Rule 118.17. Reciprocal discipline. Any attorney admitted to practice in this state, upon being subjected to professional disciplinary action in another jurisdiction or in any federal court, shall promptly advise the grievance commission, in writing, of such action. Upon being informed that an attorney admitted to practice in this state has been subjected to discipline in another jurisdiction or any federal court, the grievance commission shall obtain a certified copy of such disciplinary order and cause same to be filed in the office of the clerk of this court.

Upon receipt of a certified copy of an order disclosing an attorney admitted to practice in this state has been disciplined in another jurisdiction or any federal court, this court shall promptly give notice thereof by restricted certified mail or personal service directed to such attorney containing: (1) A copy of said disciplinary order from the other jurisdiction or federal court, and (2) an order directing that such disciplined attorney inform this court, within thirty days after receipt of said notice, of any claim by such attorney that imposition of identical discipline in this state would be too severe, too lenient or otherwise unwarranted, giving the specific reasons therefor. A like notice shall be mailed to the committee on professional ethics and conduct of the Iowa State Bar Association. If either party so informs this court, the matter shall be set for hearing before five or more justices of this court and the parties notified thereof by restricted certified mail at least ten days prior to the date set. At such hearing a certified copy of the testimony, transcripts, exhibits, affidavits and other matters introduced into evidence in such jurisdiction or federal court shall be

admitted into evidence as well as any findings of fact, conclusions of law, decision and orders decided or issued. Any such findings of fact shall be conclusive and not subject to readjudication. Thereafter, the court shall enter such findings, conclusions and orders that it deems appropriate. If neither party so informs this court within thirty days from service of notice issued pursuant to the foregoing provisions hereof, this court may impose the identical discipline, unless this court finds that on the face of the record upon which the discipline is predicated it clearly appears: (1) The disciplinary procedure was so lacking in notice and opportunity to be heard as to constitute a deprivation of due process; or (2) there was such infirmity of proof establishing misconduct as to give rise to the clear conviction that this court could not, conscientiously, accept as final the conclusion on that subject; or (3) the misconduct established warrants substantially different discipline in this state.

Where this court determines that any of the aforesaid factors exist, such order as is deemed appropriate may be entered by this court. Rule 117 shall apply to any subsequent reinstatement or reduction or stay of discipline.

Court Rule 118.18. Notification of clients and counsel. In every case in which a respondent is ordered to be disbarred or suspended, the respondent shall:

(*a*) Within fifteen days in the absence of co-counsel, notify his or her clients in all pending matters to seek legal advice elsewhere, calling attention to any urgency in seeking the substitution of another lawyer;

(*b*) Within fifteen days deliver to all clients being represented in pending matters any papers or other property to which they are entitled or notify them and any cocounsel of a suitable time and place where the papers and other property may be obtained, calling attention to any urgency for obtaining the papers or other property;

(*c*) Within thirty days refund any part of any fees paid in advance that have not beer earned;

(d) Within fifteen days notify opposing counsel in pending litigation or, in the absence of such counsel, the adverse parties, of the respondent's disbarment or suspension and consequent disqualification to act as a lawyer after the effective date of such discipline or transfer to disability inactive status;

(e) Within fifteen days file with the court, agency, or tribunal before which the litigation is pending a copy of the notice to opposing counsel or adverse parties;

(f) Keep and maintain records of the steps taken to accomplish the foregoing; and

(g) Within thirty days file proof with this court and with the committee on professional ethics and conduct of complete performance of the foregoing, and this shall be a condition for application for readmission to practice.

Court Rule 118.19. Immunity. Complaints submitted to the grievance commission, or to the committee on professional ethics and conduct, or testimony with respect thereto shall be privileged and no lawsuit predicated thereon may be instituted.

Members of the grievance commission, members of the committee on professional ethics and conduct, and

their respective staffs shall be immune from suit for any conduct in the course of their official duties.

A true copy of any complaint against a member of the grievance commission or the committee on professional ethics and conduct involving alleged violations of an attorney's oath of office or of the Iowa Code of Professional Responsibility for Lawyers and laws of the United States or state of Iowa shall be promptly forwarded to the chief justice of this court.

Court Rule 118.20. Reports. The chairperson of the grievance commission and the chairperson of the committee on professional ethics and conduct shall, on July 1 of each year, submit to this court a report of the number of complaints received and processed during the prior period, a synopsis of each such complaint, and the disposition thereof. The name of the attorney charged and the name of the complainant shall be omitted, but a synopsis of the charges made and a report of disposition shall be included.

Referred to in Ct.R. 118.9; R.Prob.P 5 *"d"*

Court Rule 118.21. Effective dates. These rules shall have prospective and retrospective application to all alleged violations, complaints, hearings, and dispositions thereof on which a hearing has not actually been commenced before the grievance commission prior to the effective date of these rules.

Court Rule 118.22. Costs. In the event that an order of revocation, suspension, or public reprimand results from formal charges of misconduct, the court shall assess

against the respondent attorney the costs of the proceeding. For the purposes of this rule costs shall include those expenses normally taxed as costs in state civil actions pursuant to the provisions of Iowa Code chapter 625.

If there is no appeal from the report and recommendation of the grievance commission, the complainant shall file a bill of costs with the clerk of the supreme court within twenty days of the filing of said commission report. If there is an appeal, the complainant shall file such bill of costs with the clerk of the supreme court simultaneously with the filing of the complainant's last appellate brief.

Concurrently with the filing of the final decision of the supreme court, the court shall order restitution paid by the respondent to the complainant of such costs as the court may approve. No suspended or disbarred attorney may file application for reinstatement or readmission until the amount of such restitution for costs assessed under this rule has been fully paid, or waived by the supreme court.

[Court Order June 10, 1964; October 8, 1970; November 8, 1974; 118.10 January 15, 1975; 118.12, 118.14 and 118.16 November 21, 1977; 118.12 January 15, 1979; 118.1, 118.2 and 118.7 July 30, 1981; 118.16 and 118.16A March 30, 1982; 118.16A May 19, 1982; August 27, 1982 (amendment to rule 118.7 to clarify, not change, the meaning); 118.2 October 20, 1982; February 9, 1983; 118.6 March 15, 1983; 118.3 June 15, 1983; 118.1 June 24, 1983; 118.10 and 118.11 July 18, 1983; 118.9 July 17, 1984; 118.9 September 26, 1984, effective October 10, 1984; 118.7 September 27, 1984, effective October 10, 1984; 118.16 November 14,

1984, effective November 26, 1984; 118.12, 118.14, 118.16 April 25, 1985; 118.10 July 1, 1985; 118.9 October 25, 1985, effective November 1, 1985; 118.12 October 25, 1985, effective November 1, 1985; 118.2 January 22, 1986, effective February 3, 1986; 118.22 September 15, 1986, effective October 1, 1986; 118.19 July 31, 1987, effective September 1, 1987; 118.11 August 14, 1987, and Nunc Pro Tunc August 24, 1987, effective September 1, 1987; 118.20 October 16, 1987, effective December 1, 1987]

November 1981

GRIEVANCE COMMISSION RULES

RULES OF THE GRIEVANCE COMMISSION OF THE SUPREME COURT OF IOWA

[Adopted by Supreme Court Order June 23, 1975]

The following shall be the rules of the grievance commission of the supreme court of Iowa:

1. The grievance commission of the supreme court of Iowa is hereafter referred to as the commission, and the members thereof are referred to as the commissioners. The commissioners shall elect from their members one to serve as chairman and one as vice chairman and shall appoint a clerk and assistant clerk who shall serve as secretary and assistant secretary of the commission. In the absence or inability to act, of the chairman, the vice chairman shall perform all duties of the chairman.

2. The commissioners may act as a body or in such divisions as the chairman may direct. Until otherwise directed the commission shall consist of four divisions designated first, second, third and fourth, and each division shall consist of five members. The personnel of each

division shall be selected and designated by the chairman for each complaint as required. He shall appoint one of said members to serve as president of said division. One additional member shall be selected as an alternate.

3. All complaints made in accordance with court rule 118 shall be filed with the secretary, who shall refer the same to the committee on professional ethics and conduct, hereafter referred to as the committee.

4. Any complaint filed by the committee shall be filed in the name of the committee as complainant and against the attorney named in said charges as respondent. Thereafter such complaint and charges referred to therein shall be prosecuted by said committee before the commission until final disposition thereof.

5. The secretary shall cause each such complaint to be separately numbered and filed and all subsequent motions, pleadings, orders or other documents relating thereto shall be made part of such file. The secretary shall also provide for a permanent docket to be kept as required by court rule 118.5. All complaints filed by or on behalf of the committee shall be docketed therein and such file and docket shall be kept in substantially the same manner as the records relating to civil action in district court.

6. The secretary shall report the filing of each such complaint to the chairman of the commission, who shall thereupon by written order filed in the cause direct that the same be heard by the commission as a whole or specified division thereof.

7. Upon the filing of such complaint, the secretary shall also cause a written notice thereof with a copy of said complaint, a copy of court rule 118, and a copy of these rules attached to be served upon the respondent by personal service in the manner of an original notice in civil suits or by restricted certified mail. Said notice shall also notify said respondent to file a written answer to said complaint within fifteen days after completed service of said notice. Written return of service shall be made by the person making the service if by personal service, or by the secretary with postal receipts attached if by restricted certified mail, and such return of service shall be filed in the cause. Service shall be deemed complete on the date of personal service or date shown by the postal receipt of delivery of said notice to the respondent. Said notice shall be deemed sufficient if substantially in the form set out in Appendix "A", made a part hereof. [Amendment approved by Court Order November 20, 1981]

8. The respondent shall file a written answer to such complaint within fifteen days from the completed service of said notice. If he fails or refuses to file such answer within the time specified, the allegations of said complaint shall be considered denied and the commission or a division thereof may proceed as if a formal denial were filed.

9. The chairman of the commission or the president of any division thereof to which a complaint has been referred, shall direct a hearing to be held upon such complaint within a reasonable time, in the county of respondent's residence or at the discretion of the chairman within any other judicial district as shall most nearly

serve the convenience of the parties, and shall designate by written order the time and place for such hearing and the personnel of the commission or division. The secretary shall mail a copy of said order to all parties and attorneys at least ten days before the date set for said hearing. If the respondent files written objections to the hearing of said complaint in the county of his residence, the hearing shall be held at such other place as the chairman or division president shall direct by written order in which case a new notice shall be given as above prescribed.

10. No hearing shall be continued except for good cause. Except in case of emergency, any motion for continuance shall be filed at least seven days before the day of hearing. Any objections to continuance shall be filed promptly thereafter.

11. The chairman of the commission or president or any member of a division to which a complaint has been referred, or any attorney against whom a complaint has been filed, may request the clerk of the district court of the county in which any disciplinary hearing is held to issue subpoenas of every kind in all matters pending before the commission or division thereof and the clerk shall issue same. Any member of the grievance commission is hereby empowered to administer oaths to all witnesses and shall cause such testimony to be officially reported by a court reporter.

12. All answers, motions, applications, petitions, and pleadings in connection with a complaint shall be filed in duplicate with the secretary at his office in Des Moines, Iowa, and the secretary shall prepare and mail

copies thereof to the respondent, the chairman of the committee, attorneys of record, and to the chairman of the commission if sitting as a whole, or to the president of a division thereof to whom such complaint has been referred; provided, however, that on and after the day fixed for hearing any such papers may be filed in duplicate with the chairman of the commission or the president of the division, as the case may be, who shall notify all parties and attorneys of the filing thereof and a copy shall be filed with the secretary.

13. If prompt written request is filed by or on behalf of any party for a hearing upon any preliminary motion or application filed in connection with a complaint, the chairman of the commission sitting as a whole or the president of the division to whom such complaint has been referred shall by written order fix a time and place of hearing upon such motion or application and shall notify all parties and attorneys. After such hearing or if none is requested, such chairman or president of a division as the case may be, or any member of the commission or division designated by such chairman or president, shall file his written ruling upon such motion or application and thereafter all parties shall promptly comply with the terms and conditions thereof.

14. The respondent may challenge the impartiality of any member of the commission or division by motion setting forth the grounds therefor and filed within the time allowed for filing answer to the complaint. Said motion shall be disposed of as provided in rule 13 and if the challenge is sustained the vacancy thus created shall be filled as provided in rule 17.

With the consent of the complainant and the respondent, a division of the grievance commission may consist of four members. In the event the four-member division is evenly divided between a recommendation of sanction and dismissal, the division shall enter a dismissal of the complaint pursuant to the provisions of court rule 118.9. Upon such dismissal the complainant may apply for permission to appeal pursuant to court rule 118.11.

15. At the time and place fixed for the hearing upon any complaint, the commission or division thereof shall proceed to hear the evidence, briefs of authorities and arguments in connection therewith. The hearing shall be private unless a written request for a public hearing is filed by the respondent. All witnesses shall be sworn by a person authorized by law to adminster oaths or any member of the grievance commission and their testimony shall be taken in writing by a duly qualified reporter. The rules governing procedures and the order and admissibility of evidence in causes tried in district court without a jury shall be adhered to as nearly as practicable. All questions of procedure, including objections to evidence, shall be determined by the chairman of the commission or president of the division, as the case may be.

16. At the conclusion of a hearing upon any complaint against an attorney before such commissioners, the commissioners are empowered to dismiss such complaint or to reprimand the accused, and in the event of such reprimand, the commissioners shall promptly file their report of such action with the clerk of the supreme court, or if action by the supreme court of suspension or revocation of the license of such attorney to practice in the courts of this state is recommended, the commissioners

shall make a report to the supreme court of their recommendations and conclusions of fact and law concerning the complaint, answer and proof within a reasonable time of the date of the last responsive brief and argument and thereupon such matters shall stand for consideration and disposition in the supreme court. Any member of the commission has the right to file with the supreme court his or her dissent from the majority determination or report.

The secretary shall promptly cause a copy of any such report to be served on the respondent in the manner prescribed by rule 30 of the Iowa rules of appellate procedure. Such report of the commissioners shall be filed with the supreme court, together with proof of service of a copy thereof upon the respondent, as provided by rule 30 of the Iowa rules of appellate procedure.

If the charges are dismissed by the commissioners, no publicity shall be given to any of the proceedings except at the request of the respondent. All reports and recommendations of the commissioners shall be concurred in by at least three members of the division or at least twelve members of the commission as the case may be, all of whom shall have been present throughout the proceedings. [Amendment approved by Court Order December 10, 1982; July 18, 1983]

17. In case of the absence or inability of the chairman and vice chairman of the commission sitting as a whole to perform any of the duties provided for herein, said commission may designate some other member to perform such duties as acting chairman. In case of the absence or inability of the president of a division to

perform any of the duties provided for herein, said division may designate some other member thereof as acting president to perform such duties. If a vacancy occur in any division from any cause, the same shall be filled by the chairman, vice chairman or acting chairman of the commission.

18. No omission, irregularity or other defect in procedure shall render void or ineffective any act of the commission or a division or any member thereof unless substantial prejudice is shown to have resulted therefrom.

APPENDIX "A"

BEFORE THE GRIEVANCE COMMISSION OF THE SUPREME COURT OF IOWA

Committee on Professional Ethics and Conduct of The Iowa State Bar Association,	)	
Complainant,	)	NOTICE OF COMPLAINT
vs.	)	
John Doe, Attorney at Law, of ___, Iowa,	)	
Respondent.	)	

To John Doe,

Respondent above named:

You are hereby notified that there is now on file with the Secretary of the Grievance Commission of the Supreme Court of Iowa at his office at 1101 Fleming Building in the City of Des Moines, Iowa, a complaint alleging that you have committed unethical practices as an attorney and counselor at law as described therein.

A copy of said complaint, a copy of Court Rule 118, and a copy of the rules of said commission relating to hearing said complaint are attached hereto and made a part of this notice.

You are further notified to file your written answer to said complaint within fifteen days from the completed service of this notice and to abide by the further orders of said commission made in accordance with said rules.

You are further notified that said commission will hear said complaint in accordance with said rules and will take such action thereon as may be warranted by the facts and circumstances disclosed at the hearing thereon.

Dated this ___ day of ___, 19___.

Secretary of the Grievance
Commission
1101 Fleming Building
Des Moines, Iowa 50309

[Court Order June 23, 1975; November 20, 1981; June 25, 1987, effective August 3, 1987]

RULES OF PROCEDURE OF THE COMMITTEE ON PROFESSIONAL ETHICS AND CONDUCT OF THE IOWA STATE BAR ASSOCIATION

1.1. Complaints. Complaint forms shall be available to the public from the secretary of the Iowa State Bar Association, the chairperson of the committee, or the chairperson's designee. [Court Order December 12, 1974; October 30, 1985, effective November 1, 1985]

1.2. Filing. Complaints shall be accepted from any person, firm or other entity believing that an Iowa lawyer has been guilty of a disciplinary infraction.

a. Complaint must be sworn to, except when filed by an officer of the court.

b. Complaints shall include whatever exhibits complainant desires to submit.

c. They shall be filed, without charge, with the secretary of the Iowa State Bar Association.

d. The committee may, upon its own motion, initiate any investigation or disciplinary action. [Court Order December 12, 1974; June 20, 1980]

2.1. Secretary's procedure. Upon receiving a complaint in proper form as provided in section 1 hereof, the secretary of the Iowa State Bar Association, or the secretary's designee, shall:

a. Make a card record indicating the date filed, name and address of complainant, name and address of respondent lawyer, with a brief statement of the charges made. This card ultimately also shall show the final disposition of the matter when it is completed.

b. Forward the original and a duplicate for each lawyer charged in such complaint to the chairperson of the committee, or the chairperson's designee.

c. The secretary, or the secretary's designee, shall keep all files in permanent form and confidential, unless otherwise provided or directed in writing by the chairperson of the committee, or the chairperson's designee, for disciplinary purposes or by a specific rule of the supreme court of Iowa. All such files shall be available for examination and for reproduction therefrom, by the designated officer or agent of the client security and attorney disciplinary commission, pursuant to proceedings under supreme court rule 121.

d. Any such files, except for the work product of staff counsel, investigators, or administrators of the committee, shall be open to the inspection of the lawyer complained against. [Court Order December 12, 1974; November 2, 1981; October 30, 1985, effective November 1, 1985]

3.1. Committee procedure. Upon receipt of any complaint the chairperson of the committee, or the chairperson's designee, shall notify the complainant in writing that the complaint has been received and will be acted upon. [Court Order December 12, 1974; October 30, 1985, effective November 1, 1985]

3.2. The chairperson, or the chairperson's designee, shall forward to the respondent by restricted certified mail, marked "Confidential", or by personal service in the manner of an original notice in civil suits, a copy of the complaint, requesting a written response thereto, and copies of the committee rules and of supreme court rule

118. [Court Order December 12, 1974; May 13, 1983; October 30, 1985, effective November 1, 1985]

3.3. If after twenty days, no such response has been received, the respondent shall be notified by restricted certified mail that unless a response is made within ten days from receipt of notice, the committee may file a complaint with the grievance commission for failure to respond, and concerning all or any portion of the matter about which the original complaint was made. [Court Order December 12, 1974; November 16, 1984, effective November 26, 1984]

3.4. Upon receipt of response the committee shall:

a. Dismiss the complaint, and so notify complainant and respondent in writing, or

b. Cause the case to be docketed for consideration of the committee at its next hearing-meeting, or

c. Arrange for investigation of the complaint either by a member of the young lawyers section of the Iowa State Bar Association, the committee counsel, or another person, whichever in the judgment of the chairperson, or the chairperson's designee, is appropriate. [Court Order December 12, 1974; October 30, 1985 effective November 1, 1985]

3.5. When the report and recommendation of investigator is returned to the committee, which shall be within a reasonable time, the committee shall:

a. Dismiss the complaint, and so notify complainant and respondent, or

b. Cause the case to be docketed for consideration of the committee at its next hearing-meeting. [Court Order December 12, 1974]

3.6. If either witnesses or the respondent or complainant or any of them is required to give testimony before the committee, such person or persons shall be given at least seven days' written notice in advance of the hearing-meeting at which they are requested to attend and testify. [Court Order December 12, 1974]

4.1. Hearing-meetings. Hearing-meetings shall be held quarterly, as nearly as possible. A majority of the committee shall constitute a quorum. The chairperson, or the chairperson's designee, shall see to the preparation of a record of such meetings which shall become a part of the permanent files of the Iowa State Bar Association. Any evidence taken shall be under oath and may be made of record. Upon completion of the consideration of any matter before the committee, the members, by majority vote of those present shall:

a. Continue the matter, if necessary, for appropriate reasons or purposes; or

b. Dismiss the complaint; or

c. Admonish the lawyer who shall be notified in writing that he or she has thirty days from the date of mailing thereof to file exceptions with the administrator of the committee, who shall then refer the admonition to the committee, which may dismiss, admonish, reprimand, or file formal complaint with the grievance commission; or

d. Reprimand the lawyer or lawyers involved; or

e. As complainant, file a complaint before the grievance commission of the supreme court of Iowa, and thereafter shall:

(1) In cases of dismissal, so notify complainant and respondent; or

(2) In cases of admonition, notify complainant of the committee's opinion concerning the matter and its communication with the lawyer involved; or

(3) In cases where a complaint is filed before the grievance commission, prosecute said complaint to final determination. [Court Order December 12, 1974; October 20, 1982; February 9, 1983; October 30, 1985, effective November 1, 1985]

5.1. Any member of the bar desiring to expand the information authorized for disclosure pursuant to the provisions of DR 2-101 or DR 2-105, Iowa Code of Professional Responsibility for Lawyers, or to provide for its dissemination through forums other than therein authorized or otherwise to change those rules, may apply to the committee. Such application shall be made in writing by restricted certified mail, and shall include such documentation as the applicant deems appropriate. The committee thereafter shall determine, on the basis of documentation at hand, further investigation, or whatever hearings it deems to be necessary, whether all or any part of the proposal is necessary in the light of existing provisions of the code, accords with the standard of accuracy, reliability, and truthfulness, and would facilitate the process of informed selection of lawyers by potential consumers of legal services. [Court Order May 18, 1978]

5.2. If the committee is of the opinion that no relief should be granted in response to any such application and no changes are necessary, it shall make a determination to that effect and then shall proceed as provided hereinafter. [Court Order May 18, 1978]

5.3. If the committee concludes that relief should be granted in response to such application, it shall make its determination to that effect and submit the same to the supreme court by filing the same with the clerk of the court as a recommended amendment to the Iowa Code of Professional Responsibility for Lawyers, universally applicable to all lawyers admitted to practice in Iowa. [Court Order May 18, 1978]

5.4. Within ten days after the committee has made its determination under paragraphs 5.1 and 5.2 hereinabove, it shall notify applicant of its determination by furnishing said applicant a copy thereof by restricted certified mail. Applicant shall have thirty days from the date of the said mailing by the committee to the applicant to take exception to all or any part of the determination of the committee. Said exceptions shall be taken by filing with the committee within said thirty-day period, complete written notice and documentation of the exceptions and the reasons therefor, which shall be forwarded to the committee by restricted certified mail. [Court Order May 18, 1978]

5.5. Within thirty days from the receipt of the exceptions, the committee shall file with the clerk of the court a copy of said exceptions and documentations attached thereto, together with any written response which the committee seeks to make to the court together

with a certification of its mailing to the applicant a copy of its response to the exceptions, in order that the court may determine the whole matter, with or without hearing, as to the court may appear appropriate and desirable. [Court Order May 18, 1978]

5.6. Nothing herein contained shall permit any publication other than provided in DR 2-101 or DR 2-105 unless and until said DR 2-101 or DR 2-105 shall be amended by the court. No applicant for expanded information for disclosure or other publication under the said rules shall make such disclosure or publication until the same specifically has been approved by rule of the court. [Court Order May 18, 1978]

6.1. Upon written request from an officer of the Iowa court, the committee by majority vote may, if it deems appropriate, issue formal advisory opinions as to the propriety of proposed actions by members of the bar in their practice under the Iowa Code of Professional Responsibility for Lawyers. Such formal advisory opinions shall be effective unless and until modified in any way by decision of the supreme court, by amendment of the Iowa Code of Professional Responsibility for Lawyers, or by a superseding formal advisory opinion. [Court Order October 30, 1985, effective November 1, 1985]

6.2. Such formal advisory opinions issued by the committee shall be in writing and catalogued annually, as nearly as possible, and shall be available for distribution at the committee's office to members of the bar upon written request. [Court Order October 30, 1985, effective November 1, 1985]

No. 88-769

(3)

Supreme Court, U.S.
FILED
DEC 8 1988
JOSEPH F. SPANIOL, JR.
CLERK

In The

Supreme Court of the United States

October Term, 1988

JANE HARLAN,

Petitioner,

vs.

THE COMMITTEE ON PROFESSIONAL ETHICS AND CONDUCT OF THE IOWA STATE BAR ASSOCIATION, and its individual members thereof, Michael H. Figenshaw, John J. Greer, James L. Tyler, Karen E. Shaff, Marie Prince-Cohen, D. Carlton Shull, William C. Davison, Norman G. Bastemeyer, Mary Louise Petersen, and Carolyn Sloan, in their individual and official capacities; LARRY JACKSON, Deputy Commissioner of the Iowa Department of Human Services, and GORDON E. ALLEN, Special Assistant Iowa Attorney General, in their individual and official capacities,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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QUESTIONS PRESENTED

1. Are the federal courts without subject matter jurisdiction to consider the issues raised by Petitioner Harlan's complaint?

2. Did the Court of Appeals err in holding that Petitioner Harlan failed to preserve any objection to the District Court holding that Respondents are immune?

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No. 88-769

In The

Supreme Court of the United States

October Term, 1988

JANE HARLAN,

Petitioner,

vs.

THE COMMITTEE ON PROFESSIONAL ETHICS AND CONDUCT OF THE IOWA STATE BAR ASSOCIATION, and its individual members thereof, Michael H. Figenshaw, John J. Greer, James L. Tyler, Karen E. Shaff, Marie Prince-Cohen, D. Carlton Shull, William C. Davison, Norman G. Bastemeyer, Mary Louise Petersen, and Carolyn Sloan, in their individual and official capacities; LARRY JACKSON, Deputy Commissioner of the Iowa Department of Human Services, and GORDON E. ALLEN, Special Assistant Iowa Attorney General, in their individual and official capacities,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

The Respondents Larry Jackson and Gordon E. Allen respectfully oppose the Petition for Writ of Certiorari to review the opinion and judgment of the United States

Court of Appeals for the Eighth Circuit entered in the above-captioned case on August 12, 1988.

OPINIONS BELOW

Neither the opinion of the Court of Appeals nor the opinion of the District Court has been reported. Both opinions, however, are reproduced in the Appendix to the Petition for Writ of Certiorari.

JURISDICTION

The Petition for Writ of Certiorari invokes this Court's jurisdiction under 28 U.S.C. Section 1254.

PROVISIONS OF RULES INVOLVED

Iowa Sup. Ct. R. 118

Rules of the Grievance Commission of the Supreme Court of Iowa

Rules of Procedure of the Committee on Professional Ethics and Conduct of The Iowa State Bar Association

These rules are set forth in the appendix to the brief in opposition of Respondent, The Committee on Professional Ethics and Conduct of The Iowa State Bar Association.

STATEMENT OF THE CASE

Petitioner Jane Harlan, an Iowa attorney, was appointed guardian ad litem for five children involved in a child-in-need-of-assistance proceeding. Respondent Larry Jackson, as Deputy Commissioner, was the Iowa Department of Human Services official ultimately responsible for foster care placement.[1] Respondent Gordon E. Allen, as Deputy Attorney General for the State of Iowa, was responsible for providing legal advice and representation to Larry Jackson and the Iowa Department of Human Services.

In the course of the performance of these functions, Respondents Jackson and Allen filed an ethics complaint against Petitioner Harlan with the Grievance Commission of the Iowa State Bar Association. The complaint alleged that Petitioner Harlan had violated ethical proscriptions by making extrajudicial statements concerning the pending proceedings and by releasing confidential information. (Pet. App. 23-25) The complaint was investigated by the Committee on Professional Ethics and Conduct. Petitioner Harlan responded to the ethics complaint by asserting a First Amendment defense. (Pet. App. 26-27) The Committee rejected her claims, concluded she had violated disciplinary rules, and sent her notice of its recommendation of public reprimand. (Pet. App. 28-30) The notice informed her that, if she failed to file an exception to the recommendation within thirty days, the

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[1] Larry Jackson has recently left State employment but was employed by the Iowa Department of Human Services at all times relevant to the factual matters asserted by Petitioner Harlan.

reprimand would be spread upon the public records of the Iowa Supreme Court. (Pet. App. 29-30) Had Petitioner Harlan filed an exception, Iowa Supreme Court Rule 118.3 provided that the reprimand would be stricken.[2] (Resp. Committee's App. I) Had Petitioner Harlan filed an exception, no discipline could have been imposed without full hearing before the Grievance Commission and disposition by the Iowa Supreme Court. Iowa Supreme Court Rules 118.3 to 118.11. (Resp. Committee's App. I)

Petitioner Harlan did not file exceptions. Instead, she filed this action in the United States District Court for the Southern District of Iowa against Allen and Jackson and members of the Ethics Committee under 42 U.S.C. § 1983, seeking declaratory and injunctive relief and $1,000,000 in damages, as well as attorney fees. (Pet. App. 17-22) On October 15, 1987, the Iowa Supreme Court issued an Order of Public Reprimand as no exception had been filed by Petitioner Harlan. (Pet. App. 46) Harlan then filed a Petition for Writ of Certiorari in this Court asking

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[2] The Iowa Supreme Court attorney disciplinary procedures are described in the Brief in Opposition filed herein by Respondent Committee on Professional Ethics and Conduct of the Iowa State Bar Association. The appendices to that Brief in Opposition [cited herein as Resp. Committee's App.] contain Iowa Supreme Court Rule 118, the Rules of the Iowa Supreme Court Grievance Commission, and the Rules of the Committee on Professional Ethics and Conduct of the Iowa State Bar Association.

for review of that order of public reprimand; that Petition was not docketed because it was filed out of time.[3]

Meanwhile, the district court dismissed the § 1983 action for lack of subject matter jurisdiction and because all of the defendants were absolutely immune. On appeal to the Court of Appeals for the Eighth Circuit, the only issue Petitioner Harlan raised was whether the district court had subject matter jurisdiction. (Appellant's Brief in the Court of Appeals at 4; Pet. App. 4) The Eighth Circuit held that Petitioner Harlan's failure to challenge the district court's holding that the defendants are absolutely immune from liability was fatal to her appeal. (Pet. App. 4-5) Accordingly, the Eighth Circuit affirmed the district court's dismissal of the complaint. (Pet. App. 1-5) From that affirmance, this Petition for Writ of Certiorari was filed.

REASONS FOR DENYING THE WRIT

I. THERE IS NO VALID REASON TO GRANT THE WRIT OF CERTIORARI.

The Petition for Certiorari raises no important issue which needs to be resolved by this Court. Petitioner Harlan's First Amendment arguments could not be decided in this case. Neither the district court nor the Eighth Circuit reached the merits, because dismissal

[3] Letter from Joseph F. Spaniol, Jr., Clerk, Supreme Court of the United States, to Robert E. Sutton, Esq., January 21, 1988, concerning *Harlan v. Committee on Professional Ethics*.

resulted from lack of jurisdiction and the absolute immunity of Respondents.

The district court granted the motion to dismiss filed by Respondents Jackson and Allen on two different bases: (1) lack of subject matter jurisdiction (Pet. App. 10-13); and (2) the absolute immunity of Jackson and Allen from liability for damages for filing the complaint and assisting with the investigation of the disciplinary action against Petitioner Harlan. (Pet. App. 13)

In this case Petitioner Harlan waived her right to challenge the reprimand in the state court disciplinary proceedings, permitted the order of reprimand to be entered by her default, and then filed a Petition for Writ of Certiorari in this Court after the statutory deadline. Petitioner Harlan is foreclosed from challenging the reprimand by failing to litigate these challenges in the state proceedings and by failing to seek timely review by this Court.

Petitioner Harlan also asks this Court to review the Court of Appeals determination that she had waived any error in the federal district court's conclusion that Respondents were immune.[4] (Petition, pp. 10-11). A decision that a party has not preserved an issue is hardly an important question for this Court to consider. It is clear in the Eighth Circuit that failure to brief an issue on appeal waives that issue. *Borough v. Duluth, Missabe & Iron Range*

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[4] Petitioner Harlan did not present the immunity issue for review either in her statement of issues required by Federal Rule of Appellate Procedure 10(b)(3) or in her brief as required by Federal Rule of Appellate Procedure 28(a)(2).

Ry. Co., 762 F.2d 66, 68-69, n.1 (8th Cir. 1985). *See also Rubek v. Barnhart*, 814 F.2d 1283 (8th Cir. 1987). The merits of the immunity issue are not properly before this Court. A question which was not presented in the Court of Appeals cannot properly be raised as a ground for review in this Court. *Delta Airlines v. August*, 450 U.S. 346, 362 (1981); *Cardinale v. Louisiana*, 394 U.S. 437, 438 (1969). *See also District of Columbia Court of Appeals v. Feldman*, 460 U.S. 462, 482, n.16 (1983).

There is no live case or controversy remaining. Petitioner Harlan abandoned any challenge to the determination that the Respondents are immune from suit. She cannot now challenge that determination, and the Respondents' immunity from suit independently precludes any cause of action for damages.

Any claim for injunctive relief is now moot. The disciplinary proceedings against Petitioner Harlan have been completely concluded and may not now be reviewed by any court. Having taken no exception to the reprimand as provided in Iowa Supreme Court Rule 118.3 (Resp. Committee's App. I), Petitioner Harlan was publicly reprimanded by the Iowa Supreme Court. (Pet. App. 46) The only judicial body vested with jurisdiction to review that decision is this Court. Petitioner Harlan's failure to file a Petition for Writ of Certiorari in time ended the jurisdiction of *any* court to review the circumstances of her disciplinary action, and the reprimand has become a final and conclusive determination. *District of Columbia Court of Appeals v. Feldman*, 460 U.S. 462, 482, n.16 (1983).

As any request for injunctive relief is moot and it is now established that all Respondents are immune from liability, there is no relief that the Court can afford that would be of any practical effect. Thus, there is no case or controversy over which the district court may exercise jurisdiction. *DeFunis v. Odegaard*, 416 U.S. 312, 316, 94 S.Ct. 1704, 40 L.Ed.2d 164, 168 (1974).

This case falls squarely within the ambit of *District of Columbia Court of Appeals v. Feldman*, 460 U.S. 462 (1983), which held that a lower federal court has no subject-matter jurisdiction over constitutional challenges which are inextricably intertwined with a specific state attorney licensing proceeding. There can be no colorable claim that the courts below decided this case in conflict with this Court's decisions with regard to that jurisdictional issue – the only relevant issue in this request for review. Nor is there a split in the Circuit Courts of Appeals that needs to be resolved by this Court.

This case is a straightforward instance of the district court and, subsequently, the Eighth Circuit correctly applying well-established law to arrive at the only jurisdictionally correct result – dismissal of the complaint.

II. THE DISTRICT COURT DECISIONS CONFORMED TO SETTLED LAW IN HOLDING THAT THE FEDERAL COURTS LACKED SUBJECT MATTER JURISDICTION OVER THIS CHALLENGE TO A STATE ATTORNEY DISCIPLINARY PROCEEDING.

The district court held it had no jurisdiction because state court orders disciplining members of its bar "may be reviewed only by the Supreme Court of the United States on certiorari to the state court and not by means of

an original action in a lower federal court," quoting *District of Columbia Court of Appeals v. Feldman*, 460 U.S. 462, 482, n.16 (1983). (Pet. App. 11)

Petitioner Harlan's action in the federal district court was an impermissible attempt to collaterally attack state judicial proceedings. The district court properly decided that it was without jurisdiction to review state court decisions made in judicial proceedings, even when constitutional claims are raised, as those claims are inextricably intertwined with the Iowa Supreme Court's decision in a judicial proceeding and an opportunity to raise and litigate the constitutional issues was afforded in those judicial proceedings. *Feldman*, 460 U.S. at 483-84, n.16. (Pet. App. 11-13)

This Court has also held that "federal courts should refrain from enjoining lawyer disciplinary proceedings initiated by the state ethics committees if the proceedings are within the appellate jurisdiction of the appropriate State Supreme Court."[5] *Ohio Civil Rights Commission v. Dayton Christian Schools, Inc.*, 477 U.S. 619, 627, 106 S.Ct. 2718, 91 L.Ed.2d 512, 522 (1986), citing *Middlesex*, 457 U.S. 423. Attorney disciplinary proceedings in Iowa are clearly within the appellate jurisdiction of the Iowa Supreme Court. *Committee on Professional Ethics and Conduct of the Iowa State Bar Association v. Michelson*, 345 N.W.2d 112 (Iowa 1984).

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[5] At the time she filed the complaint, a timely exception to the reprimand could still have been taken. Abstention by the district court from exercising jurisdiction over the merits of the complaint would have been appropriate at that juncture, due

(Continued on following page)

The district court has subject matter jurisdiction over "general challenges to state bar rules, promulgated by state courts in nonjudicial proceedings, which do not require review of a final state-court judgment in a particular case." *Feldman, supra,* at 486. *Feldman* clearly establishes, however, that a federal district court does not have jurisdiction over "challenges to state court decisions in particular cases arising out of judicial proceedings even if those challenges allege that the state court's action was unconstitutional." *Id.* Review of the latter decisions may only be had in this Court. *Feldman, supra.* Indeed Petitioner Harlan sought review here of the Iowa Supreme Court Order of Reprimand, but her petition for writ of certiorari was dismissed as not timely. *See* note 3, *supra.*

(Continued from previous page)

to the pending state disciplinary proceedings within the jurisdiction of the Iowa Supreme Court against the named plaintiff in the district court action. *See Middlesex County Ethics Committee v. Garden State Bar Association,* 457 U.S. 423, 102 S.Ct. 2515, 73 L.Ed.2d 116 (1982); *Younger v. Harris,* 401 U.S. 37 (1971); *see also Pennzoil v. Texaco, Inc.,* 481 U.S. ___, 107 S.Ct. 1519, 95 L.Ed.2d 1 (1987); *Moore v. Sims,* 442 U.S. 415, 99 S.Ct. 2371, 60 L.Ed.2d 994 (1979); *Ronwin v. Dunham,* 818 F.2d 675 (8th Cir. 1987); *Hensler v. District Four Grievance Committee,* 790 F.2d 290 (5th Cir. 1986). Many courts have declared that the field of state attorney discipline is one that is particularly well suited to the principle of federal non-interference. *See Gipson v. New Jersey,* 558 F.2d 701 (3rd Cir. 1977); *Erdmann v. Stevens,* 458 F.2d 1205 (2d Cir.), *cert. denied* 409 U.S. 889, 93 S.Ct. 126, 34 L.Ed.2d 147 (1972). *See also Anonymous J. v. Bar Association of Erie County,* 515 F.2d 435 (2d Cir. 1975), *cert. denied* 423 U.S. 840, 96 S.Ct. 71, 46 L.Ed.2d 60 (1976); *Anonymous v. Association of the Bar of City of New York,* 515 F.2d 427 (2d Cir. 1975), *cert. denied* 423 U.S. 863, 96 S.Ct. 122, 46 L.Ed.2d 92 (1976). Abstention would also be appropriate in this context under principles articulated in *Burford v. Sun Oil,* 319 U.S. 315 (1943).

Petitioner Harlan alleged that her actions were protected by the First Amendment and could not form the basis for disciplinary action, and she alleged that the disciplinary action was initiated in bad faith to retaliate against her, etc.[6] (Pet. App. 1, 17-22) She did not claim that the disciplinary rules under which she was reprimanded were invalid and unconstitutional on their face.

Clearly, this action involved a challenge to a state-court decision in a particular case arising out of judicial proceedings and any constitutional claims raised by Petitioner Harlan were inextricably intertwined with those judicial proceedings. In *Feldman*, this Court noted:

> If the constitutional claims presented to a United States District Court are inextricably intertwined with the state court's denial in a judicial proceeding of a particular plaintiff's application for admission to the state bar, then the District Court is in essence being called upon to review the state-court decision. This the District Court may not do.

460 U.S. at 482, n.16. *See also Brown v. Board of Bar Examiners*, 623 F.2d 605 (9th Cir. 1980); *Doe v. Pringle*, 550 F.2d 596, 597 (10th Cir. 1976). Nowhere in her complaint or

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[6] The Petitioner asserts in her Petition that the "bad faith" exception articulated by this Court in *Middlesex County Ethics Committee v. Garden State Bar Association*, 457 U.S. 423 (1982), a case decided on the basis of abstention, is recognized by implication in footnote 16 of *Feldman*, 460 U.S. at 482. Petitioner's Brief p. 9. Respondents find no basis whatsoever for that assertion in footnote 16. The test clearly articulated in *Feldman* instead hinges on whether the constitutional claims are inextricably intertwined with the state court's application of its rules to the circumstances of this Petitioner.

subsequent briefs did Petitioner Harlan make a constitutional challenge to the disciplinary rule as *promulgated* but rather challenged the *application* of the rule to her *particular factual circumstances*, a decision over which the district court lacked jurisdiction. *Worldwide Church of God v. McNair*, 805 F.2d 888 (9th Cir. 1986). *See also Czura v. Supreme Court of South Carolina*, 813 F.2d 644 (4th Cir. 1987).

Dismissal of Petitioner Harlan's complaint was fully consistent with this Court's decisions. In an attempt to suggest a conflict among the circuits, Petitioner Harlan cites two decisions which the district court allegedly ignored in holding that it lacked subject-matter jurisdiction – *Hirschkop v. Snead*, 594 F.2d 356 (4th Cir. 1979), and *Chicago Council of Lawyers v. Bauer*, 522 F.2d 242 (7th Cir. 1975). (Pet. Br. at 10) Both cases were decided before *Feldman*. Each was a facial challenge to bar rules; the complaints did not arise from specific disciplinary proceedings. The *Bauer* case involved federal, not state, court rules. These cases are clearly not in conflict with the decisions in this case.

Thus, the district court properly dismissed the complaint for lack of subject matter jurisdiction.

III. THE DECISIONS BELOW DO NOT RAISE THE QUESTION WHETHER THE COMPLAINT STATES A CAUSE OF ACTION UNDER 42 U.S.C. § 1983.

The first question ostensibly presented for review is whether the complaint states a cause of action under 42 U.S.C. § 1983. The Petition argues certain First Amendment issues. However, these issues are not presented by

the decisions below. Neither the Eighth Circuit nor the district court reached the issue whether the complaint stated a cause of action under § 1983, so that issue is not properly before this Court. (Pet. App. 1-5, 9-14)

CONCLUSION

For these reasons, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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